

N. 2820

No. 13,658

IN THE

United States Court of Appeals
For the Ninth Circuit

see vol. 2819

MILTON H. OLENDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

LEO R. FRIEDMAN,

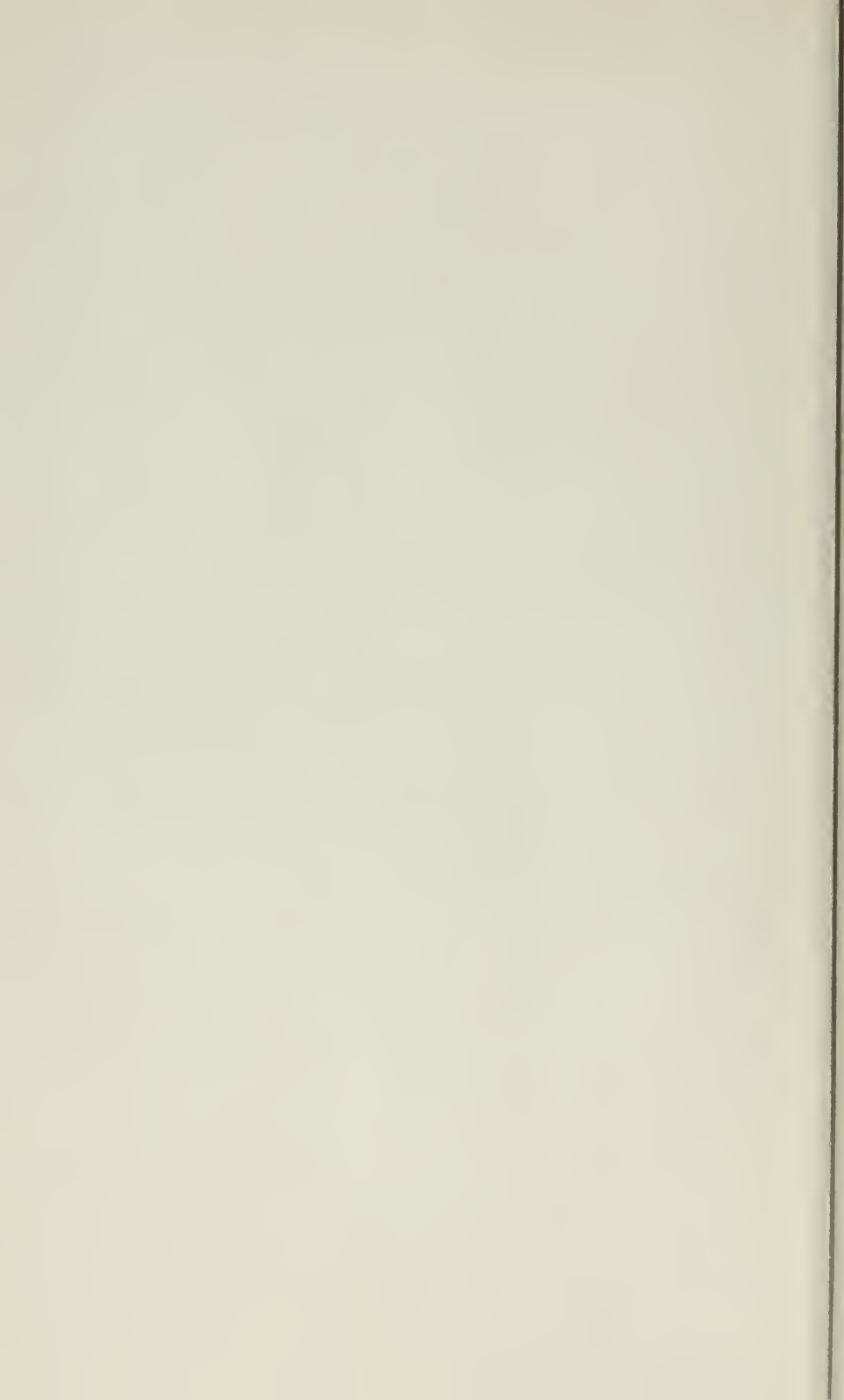
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MILTON H. OLENDER,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

APPELLANT'S OPENING BRIEF.

Appellant was tried and convicted on four counts of an indictment, each count charging a violation of Title 18 U.S.C. Sec. 145b, attempt to evade the payment of income taxes. (R. 3-6.)

Count 1. Charged the filing of a false and fraudulent personal income tax return for the calendar year of 1945. (R. 3.)

Count 2. Charged the filing of a false and fraudulent income tax return for the calendar year 1945 for his wife Bessie B. Olender. (R. 4.)

Count 3. Charged the filing of a false and fraudulent personal income tax return for the calendar year 1946. (R. 5.)

Count 4. Charged the filing of a false and fraudulent income tax return for the calendar year 1946 for his wife Bessie B. Olender. (R. 5.)

The Court sentenced appellant to imprisonment for a period of 3 years to pay a fine of \$20,000 and costs. (R. 55-6.)

From the foregoing judgments and sentences appellant prosecutes this appeal.

JURISDICTIONAL STATEMENTS.

1. *Jurisdiction of the District Court.* 18 U.S.C. Sec. 3231 provides that "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

2. *Jurisdiction of this Court upon appeal to review the judgment.* 28 U.S.C. Sec. 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 1294 provides in part that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

3. *The pleadings necessary to show the existence of jurisdiction* are the indictment (R. 3) and the pleas of not guilty. (R. 7.)

4. *Facts disclosing the basis upon which it is contended that the District Court had jurisdiction and this Court has jurisdiction to review the judgments in question.* These facts are set forth in the introductory sentences to this brief and will be stated more fully in the following abstract of the case.

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

1. **General nature of the case, the theory on which it was tried, and the main issues involved.**

The indictment charged the appellant in four counts with the filing of false and fraudulent income tax returns for himself and his wife, computed on a community property basis, for the calendar years 1945 and 1946. Counts one and two refer to the year 1945 while counts three and four refer to the year 1946.

The Government attempted to prove the foregoing charges by relying on the "net worth method" of proof. In order to do so the Government had to establish to a fair degree of certainty, appellant's net worth as of December 31, 1944 and December 31, 1945. It also had to establish to such degree of certainty, appellant's net worth as of December 31, 1947. A failure of proof in any of these regards would render all computations by the Government erroneous to such an extent as to constitute a failure of proof of the charges contained in the indictment. (*United States v. Fenwick* (7 Cir.), 177 Fed. (2d)

488, 491; *Brodella v. United States* (6 Cir.), 184 Fed. (2d) 823.)

In support of the charge the Government introduced through the testimony of Charles R. Ringo, an attorney and accountant, a comparative net worth statement of appellant covering the years 1941 and 1947. The document was admitted as United States Exhibit No. 24 and is set forth in the appendix hereto at page 19.

The Government also introduced in evidence a computation of what it considered to be the net worth of appellant at the end of the periods in question. This was admitted as United States Exhibit No. 25 and is set forth in the appendix hereto at page 20.

Appellant countered by introducing in evidence the computation on which he relied as showing his net worth. This document was admitted as Defendant's Exhibit "AK" and is set forth in the appendix hereto at page 28.

Appellant also introduced (Defendant's Exhibit AL) 2 schedules constituting an analysis of the Goodman transaction and the Saraga transaction. This exhibit is set forth in the appendix at page 33.

The parties entered into a written stipulation (U.S. Exhibit 15) as to the assets and liabilities of appellant and his wife at the close of the years 1944, 1945 and 1946. This stipulation is set forth in the appendix at page 36.

The main issues involved in the case were whether appellant had \$50,000 or \$72,000 plus in his safe deposit box

as of December 31, 1944; whether \$20,000 of the bonds found in the safe deposit box belonged to appellant or to appellant's mother; whether appellant had \$20,550 of sailor suits on hand at the beginning of the net worth period (this matter is referred to throughout the trial as the Goodman transaction).

It was on the foregoing propositions that the theory of the Government's case was based. This is made manifest from the prosecutor's closing argument to the jury where he states (R. 1357) as follows:

“What are the three big issues in this case?

- 1, shall you credit the defendant with \$72,000 rather than \$50,000 in his beginning net worth?
- 2, shall you credit him with \$20,550 as the value of the Goodman suits on hand in the beginning net worth?
- 3, who owned the \$20,000 in bonds?

Those are the three big issues.”

In addition to the foregoing and as minor issues in the case were the following:

1. Whether or not his statement of accounts payable should be reduced by the sum of \$6,903.02 due to the fact that such accounts had been paid and the payment not stated on his books.

2. Whether stock in the Asturias Corp. should be included in his net worth at the value of \$5,000.

2. Government's case in chief.

The Government first introduced in evidence, through a Deputy Collector of Internal Revenue, the following documents:

Income tax returns of Milton Olender and his wife for the years 1945 and 1946 (U.S. Exhibits 1, 2, 3, 4; R. 70.)

Returns of Milton Olender for the years 1942 and 1943; the return of Mrs. Olender for 1943 and the returns of Mr. and Mrs. Olender for 1944. (U.S. Exhibits 5 to 10 inclusive; R. 72.)

Returns of Milton Olender for 1947 and 1948. (U.S. Exhibits 11 and 12 for identification; R. 73.)

Partnership returns of Olender, Hamilton, Kaplan and Gambor for 1945. (U.S. Exhibit 13 for identification; R. 73.)

Partnership return of Olender, Gambor, etc. for 1946. (U.S. Exhibit 20 for identification; R. 108.)

Return of the Army-Navy Store (Olender's) for 1942. (U.S. Exhibit 6; R. 108, 110.)

Certificates of assessments and payments of Milton and Betty Olender for the years 1942 through 1947. (U.S. Exhibits 21, 22, 23; R. 111, 112.)

GEORGE HORNE, called as a witness for the Government:

I am a certified public accountant. In the year 1946, I was employed by a corporation known as the Asturias Import and Export Corporation, and in connection with my employment by that corporation I maintained the books. In July, 1946 there was an entry of \$5,000 for a

purchase of stock by Milton Olender. (R. 75.) The books reflect a subsequent receipt of the same amount from Milton Olender. On December 13, 1946, there was a receipt for \$5,000. That was credited to a notes payable account. Later on that amount was transferred to capital stock amount (*sic*) for the capital stock concern in the name of Milton Olender. The book entry date was in January, 1948. (R. 76.) I do not believe that was the date on which that stock was issued to Mr. Olender. I believe the stock was issued prior to that time. I do not know the date. The shares purchased by Mr. Olender July 1, 1946, remained outstanding as of the end of that year, December 31, 1946. The entry, July 1, 1946, shows that 500 shares were purchased by Mr. Olender. The books do not show the number of shares issued. Just the transfer from the notes payable account to the stock account. I have testified with respect to the entry on December 13, 1946, that the corresponding credit was made to the account notes payable. I believe that transaction was intended for a capital contribution by Mr. Olender. (R. 76.)

(The book was admitted in evidence as U. S. Exhibit No. 14.)

(*Cross-examination.*) The transfer from the notes payable account to the stock transfer account was made January, 1948. I was employed throughout that time by the corporation. (R. 78.) I did not make an audit of the books to find the value of that stock as of December 21, 1947. The second payment of \$5,000, December 13, 1946, was intended to be a capital contribution. From an accounting standpoint that is the only way you could handle it until

such time as the stock was actually issued or permit granted for the issuance of stock. It was intended to be a capital contribution. I know that from the conversations at the time it was made. There is a period there when the contribution is made and application is made to the corporation commissioner for a permit to issue stock. Until such time as the stock is actually issued I believe the stockholder could withdraw the amount as contributed. After the stock is issued he would not be able to withdraw it. I cannot answer the question whether the corporation was ever in a position to pay him back the amount. (R. 78-9.) In the affidavit now shown to me which is dated the 5th day of October, 1951, I state:

“As of December 31, 1947 corporation was, in my opinion, hopelessly insolvent. No action was taken by the interested parties—stockholders, creditors or management—to procure the dissolution of the corporation or put it in bankruptcy because of the apparent futility of any action which might have been taken. In my opinion, any interest held in the corporation whether evidenced by capital stock, note or creditor’s claim was totally worthless as of December 31, 1947.”
(R. 82.)

It is my opinion that statement is true. I have used another surname than Horne. It was Horenstein.

BENJAMIN H. NEIDEN, called by the government, testified:

I am a manufacturer’s representative, women’s apparel. During its active existence I was associated with the Asturias Corporation. I was vice president, general man-

ager, and treasurer of the corporation. I have brought with me the stock records book of that corporation.¹ (R. 90.)

(*Cross-examination.*) I have no way of telling the date when Mr. Olender received the stock. I would say that I am familiar with the financial affairs of the corporation. (R. 96.) We had ceased operations in July 31, 1947. At that time this company was definitely in financial jeopardy. It was felt, apparently, by the Board of Directors that the organization could not proceed further, and was either insolvent or additional capital had to be added. The corporation did not continue active functions after July 31, 1947.

CHARLES R. RINGO,² called by the government, testified:

I am a certified public accountant, associated with D. A. Sargent & Company, certified public accountants. I am also an attorney at law admitted to practice in the State of California. (R. 113.) Mr. Sargent is not an attorney at law. (R. 113.) Mr. Olender came to the firm and saw me up there in the early part of 1948. (R. 114.) I asked Mr. Olender to submit to me figures of estimates of his net worth, and then I went over his affairs with him. I will say that all the figures submitted are purely Mr. Olender's

¹Board Minutes of Asturias Corp. of April 23, 1947 read into record and marked U.S. Exhibit 17; R. 92.

²When the witness Ringo was called by the Government, appellant repeatedly objected to any testimony being elicited from him on the grounds the relationship of attorney and client existed between the witness and appellant. This was overruled by the Court. The full substance of this matter is set forth in Specification of Error No. 6.

figures. There was no chance of auditing here because of the nature of the transaction. (R. 117.)

Mr. Olender hired me to look into his tax problems. (R. 118.) I believe the period I covered in my work was 1942 through 1947. (R. 119.) I first asked Mr. Olender to bring me in, to the best of his recollection, the statements of his net worth at the end of each year, showing his figures as he thought they were. Then I got hold of his bank statements and by talking to him and asking him questions I tried to rearrange these figures so as to get the correct figures for the time because necessarily on an individual that way it would be absolutely impossible for the individual to come right out now and say this is it. I was trying to reconstruct. I asked the defendant to bring his net worth figures for each year in order to reconcile his income with his net worth. (R. 120.) I did not make an audit of his books and records. In a great many of these transactions they were purely cash transactions by use of currency and it would be impossible to verify figures. (R. 121.) He had the Army-Navy Store and there were also a lot of investments and items of that nature which did not appear on the books and records which would be common with most individuals. I did not audit the books and records of the Army-Navy Store because I wasn't engaged to do that. (R. 121.) The books and records of the Army-Navy Store seemed to be in pretty good condition. (R. 122.)

I had conversations with Mr. Olender concerning a transaction between the Army-Navy Store and one George Goodman. (R. 123.) Those discussions took place in my

office. (R. 123.) I think Mr. Root gave me a list of cashier's checks at the time that they were used to purchase these goods from Goodman. I asked Mr. Olender if he bought these goods from Goodman and what was done with the goods, and we were never really able to get the whole story of it. The Goodman transactions weren't entered into the books, as far as we could find. (R. 124.) We used the net worth approach because I was asked to get a net worth statement by the revenue agent. (R. 125.) I determined that the books and accounts of the Army-Navy Store were not complete as far as the Goodman transaction. It never went through the books of the Army-Navy store, either the acquisition or the disposition of it. (R. 125.) The document which is now before me which is entitled "Milton H. Olender Comparative Worth Statement of December 31, 1947 and December 31, 1941" is my attempt to work out the net worth of Mr. Olender at a beginning and an ending period, and I have tried to reconcile that to his income tax returns and tie them together. The document marked "Exhibit 1" which is in front is the summation of the net worth at the beginning and end of those two periods as best I could determine. (R. 127.) The similar documents now shown me bear in the upper right hand corner Exhibit 2, Exhibit 3, pages 1 and 2, Exhibit 4, Exhibit 5, Exhibit 6, Exhibit 7 and Exhibit 7-Schedule A, are the details of what appears in Exhibit 1, and the last exhibit, Exhibit 7, is the accounting for the increase in net worth. I first asked Mr. Olender to give me an estimate statement of his net worth at various dates. Then I went through his safe deposit box to find out what was in the safe deposit box and then I tried to

trace back how he acquired these various assets he had and through discussions with Mr. Olender and asking questions, so if there were things not included in the safe deposit box that should be included, I tried to get the information from which I could work up these net worth statements. (R. 128.) I saw the items in his safe deposit box and asked him how he acquired them. I saw cancelled checks for various items. I did get his bank statements, which were incomplete, and a period I couldn't get. I got transcripts from the bank, picked out the larger items of expenditures on there to see if they would account for more assets and asked him to get me more information so as to work it out. There was no way of knowing just what he spent for living, because I don't know just what he did spend. They are purely figures that were given to me by Mr. Olender. (R. 129.)³

I had a conversation with the defendant with respect to an item included in Government Exhibit number 24 under assets as of December 31, 1947 entitled "single premium life insurance policy \$15,833.46". The conversation took place in my office during a period when we were working on his net worth. (R. 130.) Mr. Olender brought this data in to me just after I worked up the preliminary net worth, and he brought this item to me and told me that he had something that he had forgotten to include. I said at the time it would throw his net worth out of balance. He asked me if I would leave out the Asturias stock, because it was worthless, because he didn't want to involve his mother in connection with certain gifts she had

³The document marked "Exhibit 1", admitted as U.S. Exhibit 24 (R. 129) and is set forth in the appendix.

made to him. His mother was getting old and he didn't want to have her explain. (R. 131.) That request was made to me after I called the defendant's attention to the fact that the \$15,000 single premium life insurance policy had been left off the net worth statement, and therefore it would be out of balance to that extent. (R. 131.) I went to Monroe Friedman and he insisted it would have to go in. He would have to give the explanation. (R. 132.) We discussed the item of the single premium life insurance policy with Mr. Friedman in the presence of Mr. Olender. We told him nothing could be left out and we would have to get the gifts from his mother. I believe a list of securities owned by him was not in his safe deposit box but we did get that from the cancelled checks. I asked him to produce cancelled checks. (R. 132.) The defendant's ownership of Asturias stock was included in my net worth statement as shown in the defendant's Exhibit number 24. The value of that stock as shown on the net worth statement is \$5,000. The defendant, Olender, did not tell me that he had purchased an additional \$5,000 worth of Asturias stock. (R. 133.) The photostatic copy of a document now shown me bearing the title "M. Olender Comparative Balance Sheets, 1941-1946" is a summary of the items he brought to me, the various statements he brought to me of his net worth. I had asked him to bring me estimates of his assets and liabilities. That is in my handwriting. Mr. Olender took back the originals and the information which appears on this document I got from Mr. Olender. (R. 134.)

(The photostat copy referred to was received in evidence as United States Exhibit number 26.)

(Counsel for the government read the first item of the exhibit "Cash in Vault" and stated that, as of the 31st of December, 1944, the figure was shown as \$50,000.)

I examined the contents of the taxpayer's safe deposit box in the Bank of America, 12th and Broadway in Oakland on Wednesday, May 5, 1948, about 10 A.M. I have my contents right here.

(*Cross-examination.*) I prepared this comparative net worth statement for Mr. Olender by questioning him orally about his affairs. I made no audit of his affairs. No audit of his books. (R. 137.) I did not attempt to fit this comparative net worth or analysis of his accounts and affairs into any particular year. I started out with that idea, but I did not finally do it. I made an inventory on May 5, 1948 of the contents of the safe deposit box and I prepared a memorandum right there at the safe deposit box as I was going through these things. (R. 137.) I have a memorandum here "bonds held for mother, 2¼% Treasury Bonds" listed as \$20,000 worth. I was there with Mr. Olender. (R. 138.) I understood he was taking the Goodman transaction up with Mr. Friedman as to how he disposed of the stock. He explained to me that he made a purchase of about \$20,000 worth of stock from a man by the name of Goodman. The goods were delivered to him and they were not proper for his store, and he was able to dispose of most of them at cost—about 75% of them at cost in various transactions, and that he made no profit or loss on the deal and he did not, as a result, put them into the books of the Army-Navy Store. (R. 139.) I got that I think from Mr. Root at the time

that he brought me the data, and I talked it over with Olender on the cashier's checks. (R. 139.)

I made up a comparative net worth statement because the government asked for it. In making up that net worth statement from the information received from Mr. Olender, he did not tell me about any additional Asturias stock. After I had discussed it with the agents and they asked about that item, I went back to discuss it with Mr. Olender. He told me that in his mind there was no point of putting any worthless stock in a net worth statement. In fact, at the time he asked me to leave it out and he said the stock was worthless anyway and it should not be in net worth. He told me he lost all the money he put in and that the company was hopelessly insolvent. (R. 141.) Mr. Olender failed to tell me at the same time of a bank account of his wife, and subsequently in conversation with the agents, Mr. Root and Mr. Whiteside, they asked me in the comparative net worth statement where that account was shown. They told me it was not included. (R. 143.) After I took up these two problems with Mr. Olender that is, as to why he had omitted the item of the Asturias stock and why he had omitted the item of his wife's bank account and her furs, he told me that in his idea as an accounting for whatever net worth statements were supposed to be made, it didn't belong there. I prepared this net worth statement by questioning him as to his assets. I questioned him as to his bank accounts and he gave me the names and locations of two or three of his accounts. I don't know where his wife's bank account was. (R. 146.) I believe Mr. Olender had

a girl keeping the books, and I believe they were not in his handwriting. (R. 147.) Mr. Olender told me that his parents had been quite wealthy and he had inherited a lot of money. The books of the Army-Navy Store did not reveal any of the personal investments and other affairs of the defendant. You very seldom find anybody including their personal investments in their business books. (R. 148.)

This comparative net worth study that I prepared wasn't intended to be a full and final and complete study by any means. That was just a starting point for the other study I prepared. (R. 149.) If I had tried to break this down into a period of years it would have shown that the defendant had over-reported income as well as under-reported income. (R. 150.)

(*Redirect.*) I say here is the list of bonds of what was in the safe deposit box and on the second page I have down here bonds being held for mother and they are $2\frac{1}{4}\%$ Treasury bonds, and there is a total of \$20,000 worth. That the entry is right here (indicating). (R. 150.) He told me those bonds belonged to his mother, and I believe it was also identified in the box that they were his mother's. (R. 151.) The yellow paper now shown me, containing a number of figures, entitled at the top "M. Olender shares" and the word expense, is the figures that Mr. Olender gave me in order to prepare his 1947 income tax return. That is in his handwriting, except you will see where it says "interest" I have inserted in my own handwriting "U. S. Government Bonds \$1225". (R. 151-2.) Another document now shown me, consisting of two pages

which says at the top "Income taxes, depreciation, Olender, Hamilton, Kaplan Fresno Partnership" is the data which Mr. Olender gave me for preparation of his 1948 income tax return.

(The said documents were marked United States Exhibits 27 and 28 for identification.)

The figure shown for interest for the year 1947 in Exhibit number 27 is \$1225. The similar figure for the year 1948 is \$775. (R. 163.)

TRUMAN H. HARLEY, JR., called by the Government, testified:

In 1946 I was employed by the Bank of America, Oakland Main Office; the three documents you show me entitled "Form TCR-1 Report of currency transactions" dated January 10, 1946, March 26, 1946 and September 20, 1946, are merely reports of large sums of cash given to the tellers in the bank either for deposit or for the issuance of cashier's checks. (R. 179.)⁴

I had a conversation with Mr. Olender relative to the Treasury forms I have identified; (R. 182.) Mr. Olender stated that some member of the Government had asked him about those reports submitted from the bank and he seemed indignant or annoyed that we should have reported it; he said that money was used to buy bonds or cashier's checks (R. 183).

Here the prosecutor read from the forms as follows: Exhibit 30 shows the Army and Navy Store, December 5,

⁴The 3 TCR reports marked U.S. Exhibits 30, 31, 32. A similar report dated June 18, 1946, marked U.S. Exhibit 33.

1946, \$10,000 and \$15,000; "issued cashiers' checks for amounts paid with entire cash. Purpose to buy bonds."

Exhibit 31 shows M. Olender (2 transactions), first, November 9, 1945, amount \$25,000—250 \$100 bills, cashed check for \$25,000. The second, November 20, 1945, \$25,000—250 \$100 bills, deposited commercial account.

Exhibit 32. Milton H. Olender, September 19, 1946. Two entries. \$1000 in one hundred dollar bills and \$1500 in \$20 bills, deposited by defendant.

Exhibit 33. M. H. Olender, May 29, 1946, purchase of cashier's check for \$3000 paid for with 3 one thousand dollar bills. (R. 185-7.)

LENUS CARDOZA, called by the Government, testified:

I am employed by the American Trust Co.; I have produced 2 cashier's checks and the register covering those checks. (R. 187.)

I have no personal knowledge of the endorsements that appear on those checks. (R. 188.)⁵

LOUIS LEAVY, called by the Government, testified:

I am a dealer in military supplies at 1026 Mission Street, San Francisco. I know Milton Olender. I have had business dealings with him over a period of about 10 years and still have business dealings with him. In May of 1945 I sold sailor suits to one Lerman. (R. 190.) I was acting for Mr. Olender in connection with that sale. He was the owner of the suits.

⁵The two cashier's checks #7115 and #7116 and 2 register sheets admitted as U.S. Exhibits 34, 35, 36 and 37.

(Thereupon two invoices were introduced in evidence as United States Exhibits 38 and 39 respectively (R. 191).)

Two cashier's checks drawn on the American Trust Company, each in the amount of \$2500 and marked "U. S. Exhibits 34 and 35", were tendered to me by Mr. Lerman in payment of the two sales to which I have just testified. I turned these two checks over to Mr. Olender after I endorsed them. (R. 191.)

In the closing months of 1945 and early 1946 I had occasion to make other sales of sailor suits for Mr. Olender. I sold between 250 and 300 or 320. I don't remember exactly (R. 192.) In the closing months of 1945 I went to New York on my own business. On that trip I attempted to purchase sailor suits for Mr. Olender, and I took with me funds belonging to Mr. Olender for that purpose. My recollection is I took between \$6000 and \$7000. I don't remember whether it was in the form of cash, checks or otherwise. (R. 192.) The \$6000 or \$7000 came from those sales to which I have testified, and I took that money with me to New York at the instructions of Mr. Olender to buy small sizes of sailor suits. It was his money. It had come into my possession as a result of the sales of his suits, which I had made for him. (R. 193.) None of the transactions in which I engaged on behalf of Mr. Olender appeared in my books for the reason that I was not in that business. I just acted as an agent in buying those suits for Mr. Olender. I turned that money over to Mr. Saraga who was in the business of handling military supplies and he had some sailor suits at the time or was having them made, and I turned the

money over to him for the purpose of purchasing sailor suits from him. (R. 194.)

(*Cross-Examination.*) I have known Mr. Olender since about '42; I have only known him through business that he has done with me. I was going to make those purchases of sailor suits on his behalf in New York because he was a very good account of mine and I tried to help him. They were very difficult to obtain. About 1943 Mr. Olender asked me time and time again whether I could obtain some sailor suits for him. (R. 195.) I said, "The next time I go to New York I will try to obtain some for you." So when I went to New York, I believe it was in 1944, I made some arrangements with a concern, George Goodman, by which I purchased about \$20,000 worth of sailor suits for him. (R. 195.) These suits were subsequently delivered to Mr. Olender in Oakland. When Mr. Olender got these suits several weeks later he complained to me that the sizes were not what he bought. The sizes that were on the suits as 34 practically was a 38. He said I had to get rid of same as he had no tailor to cut them down. I subsequently disposed of 200 of those suits to Mr. Lerman who operates a store right opposite Mr. Olender and who had a tailor to cut them down. I never told him who they came from because I don't believe Mr. Lerman would have bought them and I don't believe Mr. Olender would have sold them to Mr. Lerman on account of competitors. (R. 196.)

MOE SARAGA, called as a witness on behalf of the Government:

I am a merchant residing at 656 Broadway, New York City. I recall a transaction late in 1945 in which Mr.

Leavy gave me between six and seven thousand dollars for the purpose of buying from me sailor suits on behalf of Mr. Olender. I have brought my books of account in response to a subpoena served upon me. (R. 199.)⁶

On page 34 there appears a receipt of \$7000.09, on August 2, 1945 from one Leavy. (R. 205.) On August 6, 1945 appears a receipt of \$6500 from the Army and Navy Store. On November 15, 1945, page 127, there appears a disbursement to the Army and Navy Store of \$7725. (R. 206.) There was a refund of \$6500; there was also a refund of 29 uniforms at \$25 each because we couldn't deliver the goods. The difference between 7725 and 6500 was a refund of an overpayment. On March 19, 1946 there is a receipt of \$7724 from Lewis Leavy. (R. 207.) There is a disbursement shown for June 24 '46 in the amount of \$7724 to Lewis Leavy. (R. 208.)⁷

(*Cross-Examination.*) I dealt entirely with Mr. Levy. I did not know Mr. Olender at all during these transactions. As to whether I would have sold directly to Mr. Olender, we were not in a position to sell any goods at the time. There was a shortage at the time. Mr. Levy was a large customer of mine. (R. 212.)

LEWIS LEAVY, recalled by the Government:

I turned Government Exhibit No. 42, which is a check payable to myself and drawn by Mr. Saraga, over to Mr. Olender. That appears to be his signature. I cannot

⁶The volumes of Saraga's cash receipts and disbursements marked U.S. Exhibits 40, 40a, 40b. (R. 204.)

⁷Check dated Nov. 15, 1945 for \$7725 payable to Army & Navy Store and check dated June 24, 1946 for \$7724 payable to Louis Levy, marked U.S. Exhibits 41 and 42. (R. 211.)

recall persons to whom I had made sales of Mr. Olender's suits in 1945 beyond the specific sales to Mr. Lerman. I testified that I had sold from 250 to 325 suits. Beyond those I don't remember exactly; it was a small amount (R. 216-7.)

SEITH L. ROOT, called by the Government:

I am an internal revenue agent, United States Treasury Department. I was assigned to this particular case the beginning of its investigation. (R. 218.) Government's Exhibits Nos. 30 through 33, inclusive, and which are now shown to me and which have been identified as reports of unusually large transactions of currency, were given to me in connection with the taxpayer's returns. (R. 219.) In the course of the investigation, I interviewed Mr. Olender on a number of occasions. I believe I first talked to the defendant on December 29, 1947. On January 12th I met with him at his place of business, 1026 Broadway, Oakland. I was there the good part of several succeeding days. (R. 220-1.) He does not employ a manager. He does the active management of the store himself. He employed a bookkeeper on a part-time basis (R. 221-2); her name is Vera Manger. The defendant said that he would supervise the maintenance of the books and records, that this was not a one-man store but a smaller store, and so that he was in a much more intimate contact with books than would be true in a larger firm. He would furnish the data to the girl for posting, and I think, in fact, some of the posting was done by him. (R. 223.) There was a cash book which reflected the receipts or sales of the business, a check register which reflected the disbursements. I believe

that all the disbursements were eventually accounted for by check, in that any cash disbursements out of the register were reimbursed by checks drawn on the firm. There was a general journal and ledger. Mr. Olender told me that the receipts were compiled from the cash register tapes at the end of the day. That is, cash business. (R. 223.) Mr. Olender took the daily readings from the cash register. I asked Mr. Olender for a comparative net worth statement. (R. 225.) I knew that the defendant's books in the Army-Navy store were not complete because the Goodman transaction was not on the books. (R. 226.) Subsequent to receiving Mr. Olender's net worth statement, I asked for a joint investigation with the special intelligence unit in this matter. From that time on Mr. Whiteside worked with me on the investigation of this case. My report in this matter, as I recall, went in in 1949. I am not certain of the date. I compared the books of the Army-Navy store with the taxpayer's returns for the years 1945 and '46. They were in substantial agreement. (R. 227.) During the course of my investigation I included some earlier years because I thought it was necessary to get the full picture. I went back to January 1, 1942. (R. 228.)

In the examination of the books of the taxpayer's I did not find any errors in the years 1945 and 1946. (R. 229.) The two checks, Government's Exhibits Nos. 34 and 35 each in the amount of \$2500, appear on the books of the taxpayer as a credit to his capital account, as a contribution of capital from the taxpayer. (R. 231.)

MELBOURNE C. WHITESIDE, called by the Government:

I am a special agent in the Intelligence Division of the Internal Revenue. (R. 234.) I am a licensed public accountant. My investigation started subsequent to the first day of December 1949. I concluded an investigation of the data which is shown on the Government's Exhibits 24 and 25. (R. 235.) We examined bank accounts, escrow records, grantee-grantor records at the county recorder's office and various other accounts. As a result of my work we found that the taxpayer had omitted \$5000 worth of Asturias stock from the net worth statement, and also a savings account of Mrs. Olender's had not been included. Mr. Root had these T.C.R. reports of a cashier's check being purchased by Mr. Olender for cash. The cashier's check was deposited in Mr. Olender's bank account. (R. 236.) Exhibit No. 33 is the exhibit which shows the purchase of cashier's check in the amount of \$3000 with \$1000 bills, and I traced these cashier's checks into the savings account of Mrs. Olender's in the Bank of America, Main Office, 12th and Broadway, Oakland. The balance in that account at the end of 1946 was \$10,000 plus. We located the second investment in the Asturias Company in the records of the company itself, and in verifying that we found that there was an additional \$5000 invested beyond the one that was shown in the taxpayer's return. (R. 237.) The omitted investment was the investment of July 17, I believe. We found that the two checks, Government Exhibits Nos. 34 and 35 which were identified by Mr. Leavy as proceeds of the sale to one Lerman on behalf of Mr. Olender were

reflected by those two checks. We found that these checks had been credited to Mr. Olender's capital account as an additional investment. (R. 238.) The check for \$7724 drawn by Mr. Saraga which is Government's Exhibit 42 is not recorded on the books of the Army-Navy Store. The check itself was deposited in Mr. Olender's personal bank account. (R. 239.) There was a withdrawal during 1947 in the neighborhood of \$6000 plus from Mrs. Olender's account. (R. 240.)

(*Cross-Examination.*) I have stated that \$5000 out of the Lerman sale was deposited in the store bank account and credited to the Olender capital account of the books of the store. There is no indication that the \$5000 was a part of the \$20,500 worth of cashier's checks purchased in January '44 and set forth in that exhibit as the Goodman checks. (R. 242.) We didn't get all the personal checks and commercial account checks for 1945. To the best of my recollection, I believe we got all the store checks. I never made an examination as to the value of the Asturias Import Export Corp. stock. (R. 243.) In the course of my investigation, I talked to Mrs. Widrin, Mr. Olender's sister-in-law. (R. 207.)

(*Redirect Examination.*) I found that the \$5000 credit to the capital account consisted of a receipt of a cashier's check at the American Trust Company, and I had determined that cashier's check was purchased at the American Trust Company by Mr. Lerman. Government's Exhibits Nos. 36 and 37 are the two checks of Mr. Lerman's to which I referred. (R. 245.) The cashier's check register shows that those two checks dated in May, 1925 (sic),

drawn by Mr. Lerman was used to purchase the two cashier's checks in evidence.

(The said documents which had heretofore been offered for identification only were now received in evidence as U. S. Exhibits 33 and 34.)

(*Recross Examination.*) I have now secured the file of the Asturias stock from the Securities Division.

Thereupon counsel for the defendant read into the record the following portion of the report of the securities division of the office of Internal Revenue:

“San Francisco, 5, California October 19, 1951. Stock and stockholders' loans are deemed to have become worthless in the year 1947, according to the attached copy of the information report dated November the 28th, 1950, prepared by M. E. Seaback, Internal Revenue Agent.” (R. 256.) (Def's Exhibit A.)

The defendant was a member of some partnerships in which some Fresno properties were involved. He sold some sailor suits which were not included in his income tax return. (R. 257.) I did not find any other income that was not reported with the exception of the ones that are in evidence.

(*Further Redirect Examination.*) Mr. Olender was engaged in partnership activity in connection with the operation of the Riverdale Ranch in Fresno. That ranch was sold in 1946 I believe. The sale of that property resulted in capital gain to the partnership. That gain was not reported by the taxpayer in the year 1946. (R. 258.)

The capital gain realized from the sale of the Riverdale Ranch does not appear either on Exhibit 2 or 4 which are the individual's tax returns for the year 1946.

(*Further Recross Examination.*) Government Exhibit No. 20, which is the partnership return of Olender, Hamilton, Kaplan and Gambor, does not show the sale of the Riverdale Ranch. There was a business loss from the operation. (R. 259.) That is under Expense Item on the return. It shows "loss on sale, \$84.22." I don't know if that is the sale of the ranch or the sale of some equipment on the ranch. (R. 260.) As I recall, I agreed to the income or the profit as we determined it. What the differences were I don't recall at this time.

HUBERT C. MYTINGER, called on behalf of the Government:

I am technical advisor, office of the Regional Counsel, Penal Division, Bureau of Internal Revenue. (R. 261.) Prior to my present employment, I served as internal revenue agent for approximately 11 years. I am a certified public accountant. (R. 262.) I have heard all of the testimony in this case and have examined all of the exhibits which have been introduced into evidence and have prepared computations of net worth and income. (R. 263.) The evidence relied upon in this particular computation which I made with respect to a very few items is contained in the stipulation, Government Exhibit 15. Those exceptions are the Asturias stock or investments. (R. 268.) Exhibits 14 and 15 are relied upon, and I believe, the testimony of two witnesses at the trial with respect to the cash in the safe deposit box. Government Exhibits 25

and 45 are relied upon coupled with Exhibit 24, the net worth statement of the defendant. Now, as to the expenditures, on the second sheet tabulation as noted here, the nondeductible expenditures, one item appears under each year which appears in this stipulation; two items appear under 1946; namely, I. Magnin and the Gray Shop, which are supported by the evidence and testimony separately. (R. 268.)

Likewise the nontaxable portion of the capital gain appearing on the second sheet is in the stipulation. (R. 269.) I have also included the Asturias items, the cash involved, and then with respect to nondeductible expenditures, the exhibits which have been introduced covering I. Magnin Company and the Gray Shop. (R. 269.) According to my computation the net worth of the defendant and his wife as of December 31, 1944 was \$191,002.07; as of December 31, 1945 \$260,113.29; as of December 31, 1946 \$283,193.62. (R. 270.) The net worth of the defendant and his wife increased \$69,111.22 in 1945. In 1946 the net worth increase was \$23,080.33. According to my computation the total amount of nondeductible expenditures not included in the net worth computation for the year 1945 was \$19,081.32, in 1946 \$26,240.37. According to my computation the amount of nontaxable capital gains of the defendant and his wife was \$139.77 in 1945 and in 1946 it amounted to \$464.47. According to my computation, assuming net worth income is represented by the increase in net worth plus allowable expenditures, less nontaxable income each year, the total net income of the defendant and his wife would be \$88,052.77 for 1945. (R. 271.) For

1946 it would be \$48,856.23. According to my computation the total amount of net income unreported by the defendant and his wife for 1945 is \$46,985.16 and for the year 1946 the sum of \$25,341.61. The 1945 returns show that they reported \$41,067.61 and for the year 1946 the returns showed a reported \$23,514.62. (R. 271.) Assuming that the unreported income to which I have just testified is taxable, one-half to each spouse on his separate returns, and assuming further that income as best corrected includes taxable long term capital gain in 1945 \$139.77 and in 1946 \$464.47, and assuming further that each spouse is entitled to exemptions as claimed on the returns which were filed by them in 1945 and 1946, the corrected amount of net income for the year 1945 from Milton H. Olender is \$44,588.96, and for Mrs. Olender \$43,463.81; the corrected taxable liability for the year 1945 from Milton H. Olender is \$23,523.67 and for Mrs. Olender for that year \$23,058.57; the total tax liability for the year 1945 would be \$46,582.24. (R. 272.) The corrected amount of the net income for Milton H. Olender for 1946 is \$25,185.62, and for Mrs. Olender \$23,670.61. The corrected tax liability for the year 1946 for Mr. Olender \$9,171.99 and for Mrs. Olender \$8,322.83. The total for the year 1946 \$17,494.82. The amount of the unreported tax liability for the year '46 for Milton Olender is \$6,117.14 and the unreported tax liability for the year 1946 for Mrs. Olender is \$5,814.89. The total unreported tax liability for 1946 is \$11,932.03. In 1946 they reported a tax liability of \$5,562.79. The reported tax liability for both Mr. and Mrs. Olender in the year 1945 is \$15,495.75. The total unreported tax liability for 1945 is \$31,086.49. (R. 273.)

(Thereupon counsel for the Government asked the following question of the witness, "Have you examined the returns filed by the defendant and his wife for the years '42, '43 and '44?" To this question counsel for defendant objected upon the ground that there was no foundation for the said question. The Court overruled the said objection and counsel for the defendant took an exception.)

I have examined the said returns. In arriving at this aggregate, I would like to explain one assumption or calculation I had to make on the 1944 return filed by the defendant's wife. (R. 273.) The last sheet of that return, the one on which the deductions would appear, is not attached to the return. There is a schedule attached to the return of the husband's, Exhibit 9 which shows that she was to claim a total deduction of \$538.50. I find that by subtracting that amount, \$538.50, from the income shown on the face of her return \$18,263.81, I arrive at a net income which apparently would be shown on the third sheet of her return of \$17,725.36. I further find that by allowing the same exemptions as she claimed on her 1945 return, the next nearest comparable year, I would have the resulting tax liability of \$6,329.45 also shown on the first sheet of her return. So I assume that this filing of net income was the \$17,725.36 which has been reported on her 1944 return. Using that figure and the net income as otherwise shown on the other returns in evidence for 1942, '43 and '44 there is an aggregate income reported of \$89,431.60. (R. 274.) I have examined the assessment certificates which were prepared by the Collector of Internal Revenue and are in evidence as Government's Exhibits 21, 22 and 23. I find a total income tax

was paid during the years 1942, '43 and '44 amounting to \$16,871.07.

(*Cross-Examination.*) The \$20,000 worth of bonds of which Mr. Ringo made an entry with a notation "Bonds belong to mother" are included in the \$82,000 figure that I used. (R. 278.) If the Asturias stocks were worthless it would be allowed as a deduction as a loss on worthless stock. (R. 279.)

I prepared U. S. Exhibit 51. I made no verification of the first item, cash in store register, \$2500 in 1944; \$1,000 for the next two succeeding years. My answer would be equally applicable to all of these items. I made no independent verification. (R. 1072.)

I never independently verified a single item on the basis of which I based my calculations. (R. 1072.)

3. Case for defendant.

CLIFFORD F. CARROLL, called for the defendant, produced the history card of a safety deposit box of the Oakland branch of the Bank of America which was received in evidence as defendant's Exhibit B and the history card of another box at the same bank, the boxes being designated as Nos. 44 and 56 respectively. The first box standing in the name of Molly or Milton H. Olender and the second in the name of Milton or Betty B. Olender. (R. 303.)

The Witness. There was a change made on April 22, 1945. Title to the box was changed to Milton Olender and Monroe Friedman. I am personally acquainted with Judge Monroe Friedman. I cannot tell from the record

how many times Judge Friedman entered that box. (R. 304.)

(The records for safety deposit box No. 56 were received in evidence and marked Defendant's Exhibit C. (R. 305.))

ELLA WIDRIN, called by the defendant testified:

The defendant is my brother-in-law. At the time of the decease of my mother I had around \$575 of my mother's money and I gave it to my brother-in-law to be used for her funeral expenses or any way he saw fit. (R. 306.) That was on August 24, 1945. (R. 309.) The defendant took care of the funeral of my mother.

S. E. REINHARD, called by the defendant:

I am connected with the Main office of the Bank of America, 12th and Broadway, Oakland. I have known the defendant approximately 20 years. I am familiar with his reputation in the community. (R. 311.) His truthfulness, honesty and integrity in the community in which he lives is very good in my opinion. I know the defendant's business. He specializes in men's clothing, working-men's clothing, uniforms, insignias and that sort of thing for army and navy personnel. I have counselled with the defendant in various business transactions. I act as his banker. (R. 311.) In 1948, to the best of my knowledge, he told me he was having some difficulty with the Treasury Department, they were going over his books, and they claimed that there was a tax deficiency or that his income was more than shown on his books. So I suggested that he go to a firm of accountants in our building known as D. A. Sargent Company and that they

would—that they enjoyed a very high class reputation and they could probably work out his problems for him. I also mentioned that one of the partners in the firm was a tax attorney, and I thought it would work very well in his picture. (R. 312.) I knew the man who was the tax attorney. His name was Ringo. Over the years I have made loans to the defendant in connection with his business. I have specifically recommended the transfer of cash balances into Government bonds. (R. 313.)

Thereupon counsel for the defendant read into the record an *affidavit of now judge then attorney Monroe Friedman*, dated September 13, 1948 (R. 323):

“Monroe Friedman, being first duly sworn, deposes and says: That ever since the year 1920 I have been and now am an attorney at law, duly and regularly licensed to practice law before all the courts of the State of California; that ever since the year 1930, I have been and now am duly and regularly licensed to practice before the United States Supreme Court.

“That I have known Milton Olender for over thirty years; that I first knew him when we were both students at the University of California at Berkeley, California; that from 1940 on, I represented him on a few occasions in some legal matters.

“That in the beginning of April, 1944, Olender called at my office and stated that he and his family were planning to go to Texas later in the month to visit his son who was in the United States Army and stationed in Texas; that he wanted me to have access to his safe deposit box during his absence, and to take care of any

matters that might arise in his business during his absence.

“That on April 22, 1944, I met Olender by appointment at the Bank of America, National Trust & Savings Association, 12th Street and Broadway, Oakland, California; that on that day, safe deposit No. 56 in said bank was transferred from the names of Milton Olender and his wife to the names of Milton Olender and Monroe Friedman; that I went in with him to look at the safe deposit box itself; that Olender opened it in my presence; that that were several papers and some bonds in the box, and also over \$70,000 in United States currency; that Olender gave me the key to said box.

“That on May 5, 1944, after Olender had returned from Texas I again met him at the same bank by appointment, and the same safe deposit box was transferred back to the names of Mr. and Mrs. Milton Olender; that on that day, Olender opened the said box in my presence, and the contents were the same as on April 22, 1944; that I then returned the key to said box to Olender; that I did not open the said box at any time between April 22, 1944 and May 5, 1944, and that said two occasions were the only times that I ever saw the said box or any contents thereof.” (Defendant’s Ex. D.)

HIRAM A. LORENZEN, called by the defendant:

I am secretary-treasurer of Money Back Smith Co. It is one of the largest men and boys clothing stores west of Chicago and is located at 12th and Washington Streets in Oakland. (R. 342.) I have known the defendant, Milton Olender, about 25 years and I have on occasion done

business with him. I would say that his reputation in the community for truth, honesty and integrity is the best. (R. 342.) In the year 1944 I had transactions with Mr. Olender in the nature of sales of surplus merchandise or merchandise that we could not sell in our own store, or that we didn't want to sell in our own store because of the type of merchandise. Mr. Olender paid in cash for most of these goods. (R. 343.) In the years 1944, '45 and '46 the size of the lots of goods he bought amounted to four or five hundred dollars. (R. 344.)

The invoices now shown me are for merchandise sold to Mr. Olender on the store of Money Back Smith. (R. 1077.) I am still employed by that firm. We made duplicates of the originals because Mr. Olender either lost them or didn't have them, and that was after our statement was sent to him and he asked us to send him duplicate invoices. These records were made under my direction from my firm's books which were kept in the due course of business and are true and accurate records of what they speak for on their face. (R. 1078.) These duplicates were made out after our statement was sent out and he asked for the duplicate bills. So those that were paid we marked "paid" and those that were not we left open. When we furnished duplicates to Mr. Olender we included the dates of payment which did not show on the originals. (R. 1079.)⁸

MORRIS LERMAN, called by defendant:

In 1945 I was engaged in the so-called military supply business, such as uniforms, hats, caps, shoes and so forth,

⁸The invoices of Money Back Smith marked Defendant's Exhibits AM and AM-1. (R. 1083.)

the need for military personnel. The checks now shown me, Government's Exhibits Nos. 43 and 44, are my checks. (R. 1142.) They were made payable to the American Trust Company for the purpose of securing two cashier's checks in payment for some sailor suits. The checks were originally made out to Mr. Lou Levy, from whom I had arranged for the purchase of the suits. I received two separate checks of \$2500 each. (R. 1143.) I paid Mr. Levy for the suits with the cashier's checks. (R. 1144.)

MILTON H. OLENDER, the defendant called on his own behalf testified:

I am the sole owner and proprietor of the Army and Navy Store in Oakland. (R. 325.)

(After stating some details of his education and business experiences and the fact that his father and uncle turned over a store to him in Fresno in 1920, and narrating certain details of his business career (R. 326-335) the witness identified a series of checks which were marked defendant's exhibit F for identification. (R. 336.))

Defendant's exhibits F and F-1, four pages of checks for identification represent payments on my checks with my name printed on the side, signed by me to my father, my uncle, and to the partnership of my father and my uncle, in the years 1920 and 1921. (R. 345.) Those checks do not represent all the payments I made to my father and my uncle. I married in 1924. (R. 349.)

I had an interest in the Olender building in Fresno during the years 1945 and 1946. I have had an interest in it since the death of my father in 1940, although I

actually didn't get the interest until the estate was closed which was about in 1940. (R. 352.)

(Here the witness details his activities from 1926 to about 1942, showing the accumulation of funds to the extent of \$75,000. (R. 359-364.))

I got \$75,000 out of that safe following my father's death which was sometime during 1942. I brought the money to the Bank of America at 12th and Broadway, Oakland, and put it in my safe deposit box, and I believe I had other funds in that box at that time. At first only I had access to that box. I believe I first got that box in 1942. (R. 365.) If Mr. Carroll of the Bank of America had given you all the records, there is a record of another box which I rented in 1942 and in 1943, as is in evidence I rented a larger box. Following my father's death I assisted my mother in the direction of her business affairs and continued to do so until the time of her death. In that period of time she made advances of funds to me, as I had the safety deposit box in the Bank of America at 12th and Broadway with my wife, I subsequently opened another box and that box was a joint box with my mother and me. (R. 366.) My mother and I were partners in all of our Fresno properties and I was handling those properties. I had all of the leases, all the insurance policies, and all of the papers connected with the property, and when my mother came up in 1944 just a short time before that I opened that box, and she came up here to stay at my home while my wife and I went to visit my son in Denver who was then at the airfield in Denver, and she brought with her at that time \$20,000

in currency, and we opened the box and put that money in that box at the time. (R. 366.) As a result of certain communications from my mother I subsequently invested that money in Government bonds. (R. 366.) From 1941, I believe until about 1943-4, I am not sure, I borrowed a total of \$33,500 from mother, which are on my books and show that sum, and I repaid her by checks from my business and which are reflected in her bank accounts during the years 1943, '44 and '45. (R. 367.) I believe it was in 1949 that I purchased this \$20,000 worth of bonds for my mother. The five books now shown me are the books of the Army and Navy Store for the years 1943 through 1946. They were maintained by my bookkeeper Vera Manger. (R. 369-370.)⁹

During the years 1942, '43, '44, '45 and '46 I was operating the Army and Navy Store at 10th and Broadway in Oakland. (R. 371.) I ordinarily had about three employees in that store. About the month of April '44, I visited my youngest son at San Antonio, Texas. On certain information I received as to the availability of an Army and Navy store in San Antonio, I made business preparations for that trip. (R. 372.) I went to see my attorney, Monroe Friedman, and told him I was going on this trip. I asked him to go down to the vault with me to sign on the box and I would remove the name of my wife and during the period that I would be gone he would be the sole person that could enter that box. (R. 373.) I told him that I had the prospects of buying a store in San Antonio and that I was taking some cash with me

⁹Books admitted as Defendant's Exhibits H, I, J, K and L.

but that I didn't know how much I needed; that if I needed more he was to go to the bank and buy a cashier's check and send it to me. Before I had brought Monroe Friedman to examine the contents of the box, I had taken out somewhere between five and ten thousand dollars. I don't remember the exact amount. About the time, in 1948 when I received a call from Mr. Root, the Bureau of Internal Revenue, and about the time I dealt with Mr. Ringo, I went to see Monroe Friedman, the present judge. (R. 373-4.) I recognize Defendant's Exhibit D; that is the affidavit of Monroe Friedman as to our dealings on the safety deposit box during April and May of 1944. (R. 375.) As a result of my conversation with Mr. Friedman this affidavit was executed. When I got to San Antonio I did not buy the store. (R. 376-7.) I took Mr. Friedman off the box after he, as he states in his affidavit, had checked it to see that it was in the same condition that it was when he went into it and I put my wife back on it.

During the war years and particularly 1945 and 1946 I had many transactions with the Money Back Smith Co. There were purchases made by me during the years '44 and '45 and '46, some of them made by cash and some of that made by check, but all recorded on my books and on Money Back Smith's books. (R. 377.) They were goods that weren't easy to get. Money Back Smith had buyers in New York, all throughout the East, and I had nobody but myself, as Mr. Lorenzen has testified, they received merchandise which, as the name implied by Money Back Smith, that if it wasn't satisfactory perfectly they would replace it or give him money back. I went to Money Back

Smith, and I could use merchandise of that type. They were underwear, hosiery, shirts and sweaters. The invoices would show what they were, I don't remember just what the specific items were. Very few of the invoices ran over \$500. (R. 379.)

The Asturias Corporation was started by two men, Rodney Asturias, Mr. Ben Neiden, who testified here this last week in regard to the stock. It was a doubtful proposition from the very beginning. (R. 379.) The second transaction of \$5000 with this firm was not in its inception a purchase of stock. I advanced money to the corporation. (R. 379-80.) I recognize a letter written by Jefferson E. Peyser which is now being shown me.

(The said letter was admitted in evidence as Defendant's Exhibit M.)

I received the shares of stock on January 2, 1948. I made the payment of the second \$5000 to the Asturias Company in, I believe, December 1946. That was a loan. (R. 382.) I didn't get the stock until 1948. When the company looked like it was broke I believe somebody suggested that the best way to collect on the thing, if you were going to put it in the income tax return as a loss, is to have it in the form of shares of stock and then the Government would rule on the fact that it was valueless and could then take your loss. But I do know that the stock, as the minutes will show, was ordered to be purchased at least a half a dozen times and before it ever went to the board the company was declared absolutely bankrupt and when they sent us the stock they were just sending us wallpaper. (R. 368.)

(Certain inventories of the Army and Navy Store at the end of 1944, '45 and '46 were marked for identification as Defendant's Exhibit N. (R. 383-4.))

(A certain invoice purported to be reflected in Government's Exhibits 40, 40A and 40B, and being a bill sent to the defendant by Mr. Saraga for the purchase of 1000 sailor suits was admitted in evidence as Defendant's Exhibit O. (R. 386.))

I did not directly enter into any transactions with George Goodman in New York but through a Mr. Leavy. As a result of those negotiations, I withdrew \$20,550 from my safety deposit box in the Bank of America. I bought about four or five cashier's checks, made out under Mr. Leavy's direction to Mr. George Goodman whom I had never met and don't know. Mr. Leavy secured those suits for me through Mr. George Goodman and where Mr. Goodman got them I don't know. (R. 386.) The entry in Government's Exhibit 25, "Olender, Cash on Hand and in Banks" and the entry "the following sums were expended from cash January 10, 1944, three cashier's checks to Goodman amounting to \$2250 each; January 22, 1944, three cashier's checks to Goodman at \$2250 each; January 22, 1944, three cashier's checks at \$2350 each to Goodman" refers, I believe, to this transaction I had with Mr. Goodman. (R. 387.)

The uniforms I received from Goodman (referring to Defendant's Exhibit M) as of December 31, 1944 or January 1, 1945, were not reflected in my inventory for that year; as of January 1, 1946 some \$8000 of them were reflected and in 1947 that had gone down to \$2000. (R. 387.)

I received those uniforms as a result of those checks I gave to Mr. Goodman; the uniforms did not correspond with my specifications—I ordered sizes 34-35-36 and 37s, the average sizes of 90% of the sailors in service; I received suits marked with those numbers but the 34s were 38s, the 35s were 39s and the 36s were 40s and the sizes went as high as 44s. It is almost impossible to sell suits of that size unless you have a tailor right in your establishment to cut them down. (R. 398-9.) I immediately complained to Mr. Levy about them.

About June of 1945 Mr. Leavy told me he knew where he could dispose of 200 of those suits if I would send them over to him. He returned the cash for those 200 suits, some \$5000, to me which I deposited in my store account. Sometime in July or August 1945 Mr. Leavy had disposed of about 280 suits totaling around \$7000 and he took that money to New York and gave that to Mr. Saraga as a deposit on suits for me, which Saraga did not deliver. Those funds were returned to me at some time. (R. 399-400.) Government's Exhibits 41 and 42 are checks which were returned to me by Saraga. (R. 400.) I sent \$20,550 to Mr. Goodman in payment for certain uniforms. (R. 402.) I found those uniforms unmerchandiseable from my standpoint and then I attempted to dispose of them on a wholesale basis, and Mr. Leavy assisted me in that respect and sold about \$5000 worth of them. (R. 402.) I got that \$20,550 out of my safety deposit box sometime in January 1944. I purchased cashier's checks made out to Mr. George Goodman at the suggestion of Mr. Leavy, and I turned those checks over physically to

Mr. Leavy. I subsequently received \$20,550 worth of uniforms from Mr. Goodman. I found I could not dispose of them so I attempted to sell them on a wholesale basis; Mr. Levy sold 200 at \$25 a suit—\$5000 (R. 403) which I deposited in the Army and Navy Store bank account.

There were 342 suits left, after selling 200 to Mr. Lerman and 280 suits which Mr. Levy disposed of, of those 342 suits some 20 had been sold in my store, put in my cash register and recorded as sales—at the end of the year the 322 suits were included in my inventory. (R. 411.) Most of those suits came in to me in 1944. (R. 412.) I ultimately attempted to show all the transactions with Mr. Levy, Mr. Goodman and Mr. Saraga on my books. (R. 422.)

In 1945 I received \$2500 from Mrs. Foote, my wife's mother. (R. 422.) Mrs. Foote had been saving up money for several years and she was in her eighties, she had lived with me practically since the day I was married until 1939 and she gave me that money for a specific purpose; I gave that money to my wife to deposit in her bank account. (R. 423.)

At the time the money was counted out in my box at the Bank of America in the presence of Judge Monroe Friedman there was \$75,000 there. (R. 423.)

When I learned the United States was questioning my income tax declarations, I went to my banker and personal adviser, Mr. Reinhard. That was early in 1948. (R. 423.) I told Mr. Reinhard that I was having some difficulties, that they were questioning some of my T.C.R. returns and some bond purchases which I had made over

the counter with him and a business transaction which I could explain, but that I wanted to get an accountant and a tax attorney. I did not want two men. I did not want an attorney and an accountant separately, but I wanted a combination of the two in one man, and he said that he knew of such a man. He said the firm of D. A. Sargent & Company had a tax attorney and accountant as a partner of Mr. Sargent in the firm. (R. 424.) I went to see Mr. Sargent and told him just what I wanted and the type of person I wanted. Mr. Ringo came to my store and I explained to him just exactly what I wanted, and told him that I wanted an attorney as well as an accountant. I retained Mr. Ringo at that time to carry out all my tax matters. (R. 425.) In my net worth statement there are many items concerning my mother, who was 70 years old and not in good health, and I didn't want any of those items disclosed. I don't think they are part of any one else's business but my mother's and mine. (R. 426.) None of that \$75,000 which I brought from Fresno and deposited in my safety deposit box came to me from my father's estate. The names on Government's Exhibit No. 20 for identification now shown me, a partnership return for the year 1946, are Olender, Hamilton, Kaplan and Gambor. Olender represents Mrs. J. Olender, my mother and me; Hamilton is Martha Hamilton, my cousin; Gambor is Terris Olender Gambor, my sister. (R. 427.)

I received gifts from my mother during the years 1944 and 1945. I don't remember the exact sums, but they are reported in the net worth statement. There were two or three thousand dollars at a time two or three times a year. (R. 427.) From reading Schedule A of Government's

Exhibit No. 25 for identification, I refresh my memory as to the gifts I received from my mother, during 1944, '45 and '46. On January 6, 1944 there was a \$2000 gift; on July 5, 1944, \$2500; on December 15, 1944, \$1000; on January 2, 1945, \$3000. (R. 428.)

I prepared the partnership return for the year 1946 which is marked U. S. Exhibit No. 20 for identification. There is a reference in that partnership return to a sale of the River Dale Ranch. In the partnership breakdown, there is a missing sheet which was filed with this return. It was called "Schedule 1040" which reported in detail the sale of that ranch. It was stapled on here originally and is not on this return. (R. 429.) I also prepared a similar form of partnership return for the year 1946 and a schedule of gains and losses, which is Schedule D, Form 1040 U. S. Government forms for income tax purposes. These forms are from my files and are my own copies of the returns that were made on the partnership. It refers to the sale of the River Dale property which was sold in 1946. (R. 430.) I submitted that with the partnership return and that was the form given to me by the Internal Revenue Office in Oakland to file with this partnership return. The State of California partnership return of income, Form 565 now shown me is a yellow duplicate copy of a return for the same partnership which was filed with the State of California for the year 1946. (R. 431.) I typed all those forms myself.¹⁰

¹⁰The State and Federal returns admitted as Defendant's Exhibits Q and P. (R. 433.)

(Cross-examination.) I took about three courses in accounting during my four years attendance at the University of California. I prepared the tax returns for myself and for my wife for the years 1945 and 1946. They are exhibits 1, 2, 3 and 4 in evidence. I have prepared income tax returns for other persons—my mother, my sister, my son and daughter, employees in my store who had just wages and such, and for a few friends. I have received compensation for preparing income tax returns for others. (R. 434.) I did not do the auditing work for the concern owned by my uncle and my father which was operated by them in Fresno. I worked for that firm for a very short period. (R. 435.) I filed the affidavit now shown me, in which I stated I was a trained accountant.

My late father died in 1940. I believe his estate was probated in the City and County of Los Angeles. I did some of the accounting work for my father's estate, it actually wasn't accounting. I did not prepare the estate tax returns. (R. 439.) The \$75,000 that was in a vault in Fresno at the time of my father's death was not included in the estate tax return. (R. 441.) My sister did not know that my father had \$75,000 at the vault in Fresno, but my mother did. (R. 443.) I did not tell the inheritance tax appraisers that I had received gifts in the amount of \$5000 for a period of ten years prior to my father's death. I did not to my recollection see the estate tax returns of my father before they were filed. (R. 446.)

I can identify the signature of my mother only on the Government's Exhibit 46, the estate tax return of my late

father, I do not know the signature of the other party. (R. 448.) My sister was the attorney for the estate. She is a former deputy district attorney of Los Angeles. (R. 451.)

I recall the testimony of Mr. Ringo that he did certain work for me in connection with the preparation of my net worth statements. (R. 447.)

(The Court after argument and over the objection of the counsel ruled that statements made by the witness, Mr. Ringo, were admissible in evidence and were not privileged as communications from a client to an attorney. (R. 456.))

Mr. Ringo gave me a list of questions concerning my assets and I returned some of them with my answers. I do not recognize the handwriting with respect to item 19 consisting of figures \$6000, \$19,000, \$42,000, \$7200 and the total figure \$75,000. (R. 457.) The figures, decrease in 1943, \$6000; decrease in 1944 (Goodman deal) \$19,000; decrease in 1945, \$42,800; decrease in 1946, \$7200 and the total, \$75,000 have no meaning to me at all. (R. 457.) I must have seen the original of that document you show me as there is some of my handwriting on it. (R. 458.) The signatures which appear written out in pencil and numbered are not in my handwriting. I do not know whether all the figures on the left hand side of the document are mine, everything here in green ink is mine. (Note: It is impossible to tell from answers of the witness (R. 458-9), whether he means everything in green ink on the document was in his handwriting or that some of it was not.) The numbers in pencil which appear

at the right are not in my handwriting. I have no recollection of seeing that document before. I do not recall giving to Mr. Ringo the information which has been put there in pencil in numerals. I have no recollection whatever of giving that information to Mr. Ringo with respect to the figures in item number 19 which total \$75,000. (R. 459.)

Exhibit P which is the partnership return for 1946 was prepared in Oakland in the early part of '47 at my place of business. (R. 460.) The partnership wasn't actually a partnership, it is a joint tenancy or ownership in common or something of that sort. (R. 461.)

To the best of my knowledge the life insurance policy referred to in Government's Exhibit 24 was paid for with the \$15,000 I took out of my business account and deposited in my personal account. I believe a personal check was issued and a cashier's check was purchased with it. (R. 466.) I kept the money that I received from Mrs. Foote until December and then deposited it with some other funds in my personal bank account. It was for the purpose of purchasing a home for her grandson and my wife's son. (R. 467.) The item Cash in Banks (Mrs. Betty Olender) for the year 1946 in Government Exhibit No. 15 which is the stipulation admitted in evidence is correct. I never told Mr. Whiteside and Mr. Root I received \$3000 from Mrs. Foote in order to enable her to qualify for old age benefits. (R. 469.) The Riverdale ranch property was sold for \$20,000. I had a one-sixth interest in that property. (R. 472.) I believe I got the \$20,550 with which I purchased the Goodman suits

from my safe deposit box. I did not deposit that sum to my business account. I used that sum to purchase cashier's checks. I did not deposit the sum in my business account and send Mr. Goodman the check for the purchase of the suits in the ordinary way, because there was no assurance that I was going to get these suits whatsoever, and if I had given Mr. Goodman a check on my store he wouldn't have accepted it. He wanted cashier's checks. I did not enter those purchases on my books at that time because when the merchandise arrived, it was unsatisfactory and I wanted to return it immediately. (R. 476-7.) I did not pick up these suits in my inventory as of the beginning of 1945 because most of them were sitting in my basement as I had received them, and I just let them sit there waiting the ultimate outcome of Mr. Leavy's transactions, trying to return them. I didn't pick them up in the inventory because it was still an unsettled item. Mr. Leavy was going to give me either new suits or the money for those suits. I picked them up in the subsequent year because all of the transactions happened then. (R. 484.)

(Redirect Examination.) I received the Asturias Import Export Corporation stock in 1948. The note now shown me is signed by the vice-president of that company (R. 510),¹¹ which they gave me for \$5000 I loaned them.

I subsequently received securities from that corporation. (R. 512.) My sales to 1940 were never \$10,000 in any year. My income tax returns will show that. My

¹¹The note is dated Dec. 12, 1946, payable ninety days after date to order of Milton H. Olender and signed Asturias Import Export Corporation, by its vice-president. (Defendant's Exhibit R.)

sales volume for the years '44, '45, and '46, would be better than \$200,000 a year. (R. 516.)

I have testified that during the period of time from approximately 1930 to 1939, my father made gifts to me of approximately \$5000 each year in cash and placed it in the vault in the Olender Building in Fresno. That was not a gift for me alone, it was for me and my wife. I placed that money in 1942 in the safe deposit box in Oakland belonging to me and my wife. (R. 529.) The two letters now shown me are letters from my mother to me. I had correspondence with my mother in reference to the purchase of some investment for her. Mother and I opened a joint safe deposit box with the Bank of America. Following this correspondence I purchased some Treasury bearer bonds for my mother and placed them in our joint safe deposit box. (R. 531.)

The specific purpose of the \$2500 given to me by Mrs. Foote was that the money was to be given to my stepson, Richard Raymond Busby. (R. 562.)¹²

(Redirect Examination.) The two photostats designated as Defendant's Exhibit Z for identification are two cashier's checks, all dated December 12, 1944, for \$248.26 and the other dated November 9, 1944, for \$1911.77 made out to Barney Clothier Shop. At the request of Mr. Barney, from whom I had purchased that amount of merchandise, I purchased these two cashier's checks, with cash in the Bank of America and mailed them to him or

¹²Bank book, savings account, Bank of America, of Mrs. Betty Olender showing a withdrawal of \$2500 on May 12, 1947 and a deposit slip showing a deposit on the same day of \$2500 to account of R. R. Busby, marked Defendant's Exhibits T and U. (R. 563.)

gave them to his brother. These checks were in payment for merchandise I had bought from him. (R. 604.) They were not for sailors' suits. They were for fifty or sixty items of merchandise on the invoice there. (R. 604.)

(*Recross Examination.*) I don't remember from what sources the cash came to pay for these cashier's checks. I haven't any record which would indicate the source of the cash. (R. 607.) I believe that this particular transaction was discovered by my accountant after the stipulation was entered into. I didn't work with the accountants. They did all the work. I don't remember whether the accountant asked from what source the cash came. There is no question in my mind that in November and December, 1944, I purchased these two cashier's checks. My name doesn't appear. Neither does the name of the Army and Navy Store. (R. 607.)

MILTON H. OLENDER, recalled for further direct examination:

My source of income during the period of 1944, 1945 and 1946 were first, from the Army & Navy Store; and secondly, the income from my rental property in Fresno; and then there was third, the income from stocks and bonds listed in Mr. Ringo's net worth statement; and, fourth, the gifts and such from my mother; and also the money entrusted to me by Mrs. Foote; and then lastly my safe deposit box. If I dealt in any cash transactions during this period of time, the cash would either have to come from my bank accounts, or from my safe deposit box. (R. 752.) I drew a final check of \$5000 to clear this account payable to the Asturias Export and Import

Company. (R. 783.) That was the investment and securities which I later deemed worthless. (R. 756.)

(The witness then testified as to various expenditures and disbursements made by him and identified various bank accounts and checks. He testified that the following expenditures made by him came out of the cash in his safe deposit box, to-wit, \$15,000 that was deposited on November 20, 1945 in trustee accounts for his three children (R. 766); that before he put Judge Monroe Friedman's name on his safe deposit box he had drawn between \$5000 and \$10,000 therefrom. (R. 769.) The information I gave Mr. Ringo about a purchase of bonds in 1944 was in the amount of \$8000 that came out of my safe deposit box. (R. 772.) The cashier's checks purchased in the month of May, 1945 totalling \$15,000 must have come from the safe deposit box. (R. 773.) The \$20,550 came from my safe deposit box. (R. 776.) The two cashier's checks that I purchased which were sent to Los Angeles to pay Barney came out of my safe deposit box. (R. 799.) The \$5000 which is represented on Defendant's Exhibit "AB" came from my safe deposit box as far as I can remember. It represents a deposit. (R. 821.)

ROLAND D. HELLMAN, called for the defendant:

I am a public accountant, registered in the State of California. Before I started practicing, I was an Internal Revenue agent five and a half years. My general assignment was all income tax cases. (R. 577.) Defendant's Exhibit G now shown me, which is a thousand dollar check, was drawn on December 23, 1944. The check was paid, deposited, on January 10, 1945. (R. 578.) The sum

of \$19,881.55 set forth in the stipulation as "Cash in bank, the Army and Navy Store, (net after outstanding checks)" is the balance after this check was issued. (R. 579.)

(The check which had been marked Defendant's Exhibit G for identification admitted in evidence.)

This check for \$1000 was one of the checks that was outstanding as of December 31, 1944. That is not included in the \$19,881.55 balance shown by the books. It had been already subtracted from the total in the banks. (R. 581.) It was therefore a cash item in Mr. Olender's hand. I know that it is not in the figure that was stipulated by looking at the books. (R. 582.) I have had access to Mr. Olender's books. I also had available and looked over Mr. Saraga's books. (R. 585.) I prepared the chart now shown me. (Defendant's Exhibit AL, see appendix.) The chart starts out with this \$20,550 cash that Mr. Olender took from his safe deposit box, and we follow it from there. Right to begin with at the top of the chart you see Mr. Olender on the left hand side. On the right side is Mr. Olender's business, which is the Army & Navy Store. The reason this chart is made up this way is to show the flow of personal funds, some of which went into the business and some of which remained in his personal possession. (R. 586.) On the right it says the \$5000 was deposited in the store bank account on June 19, 1945. That was handled through the general journal.

The date in the general journal of June 1945 when this entry was made debiting cash to the bank for \$23,000, we find that he deposited on June of 1945—made up deposits

for \$23,000, broken down as follows: One check in the amount of \$10,000 to represent the money he borrowed from Mr. Blackstone; two checks of \$2500 each, which were checks through Leavy, and there is a \$5000 item and a \$3000 item which represent cashier's checks deposited that had previously been purchased—Mr. Olender's own cashier's checks. (R. 590.) As an account practice the \$5000 received from Lerman, deposited in the store bank account June 19, 1945, was an additional investment credited to the M. Olender capital account on the bank books.

Now, the second part of the \$20,500 item—the arrows point to the right there indicating going into the Army-Navy Store for 342 suits unsold by Leavy, transferred to the store, \$8550. These were not charged to purchases on the store books. Twenty suits were sold through routine sales by ringing them upon the cash register, which is common practice. By transferring this \$8550 worth of merchandise into the Army-Navy Store, and by ringing up the sales of the 20 suits on the register and by not charging purchase expense, the cost of the goods purchased on the books, it meant that Mr. Olender contributed \$8500 worth of merchandise to the store and never took any credit on the books for having done so, which means when the merchandise was sold, it all became profit—that is, profit on the books. He had his original cost when he purchased with cash. By taking the merchandise into inventory, the portion was taken into inventory at the end of '45. By increasing his inventory, it reduced his overall cost during the year for the other sales made, and that resulted in the understatement of the cost of the goods that he actually sold during the year and resulting in

corresponding overstatement of profit of \$8550 for the year 1945. Mr. Olender's capital account should have been credited, but it was not. As a result, when the merchandise was taken into inventory, the result of that was for it to appear as an additional profit. (R. 591-3.)

The net income on the return of Milton Olender for the year ending December 31, 1945, as shown by Government Exhibit 1, was \$44,718.48. That was before nonbusiness deductions. \$41,067.61 is the total net income reported on the returns of the husband and wife for 1945. (R. 609.) The effect of putting in \$8550 worth of assets into the inventory without charging it to purchases on the store books on the net income of the taxpayer would be to reduce the profit shown from the business. The return shows the merchandise purchased during the year of \$150,458.30. If the \$8550 would have been added to that, it would have increased the purchases to \$159,008.30. The effect of that would have reduced the profit from the store operations from \$42,722.61 to \$34,172.61, thus reducing the net income reported from \$41,067.61 to \$32,517.61. (R. 610.) Following the chart on the left side where it states, "280 suits sold by Levy for M. Olender, \$7,000", represents proceeds turned over to Mr. Saraga by Mr. Levy for additional merchandise to be bought for Mr. Olender in August of 1945. The cash was not received by Mr. Olender, but Mr. Levy after making this sale, kept the cash or the proceeds. However, he received the \$7000, and that was turned over to Mr. Saraga. This is recorded in Mr. Olender's books. I find that transaction in Mr. Saraga's books. On page 84 under date of August 1, 1945 there is an entry of cash receipts from L. Levy for \$7000.

(R. 611.) The United States Exhibit No. 41 is a check from Mr. Saraga, dated November 15, 1945, made payable to the Order of the Army and Navy Store in the amount of \$7725. (R. 612.) It was possibly to clarify it and show the chain of events, how the \$725 arose and also to point out that the Saraga transactions as being on the books and as it is merely following through, as he says, the other checks, the original checks drawn to Saraga in evidence showing that a total of \$24,500 was paid to Mr. Saraga through Levy and that the invoice which reads for 1000 suits was changed to read for 951 suits at a total of \$23,775, indicating that if Mr. Olender had paid \$24,500 there would have been a refund of \$725 due from Saraga which Saraga did make and add to the other \$7000 which we were previously talking about, making up the total of \$7725 that did go into Mr. Olender's personal bank account. (R. 614.)

(Then followed an extended discussion between the Court and counsel dealing chiefly with the method of accounting and their respective theories to the effect of the evidence.) (R. 637-759.)

(Here the witness explains the entire Saraga transaction based upon Saraga's books and the accounts of appellant, as all of which are set forth in Schedule 2 of Defendant's Exhibit "AL" which is set forth in the appendix.) (R. 648 to 658.)

Exhibit W is a purchase invoice from Barney's Clothes Shop, Los Angeles, in the amount of \$2111.67. It is dated October 30, 1944. There is also an invoice dated November 30, 1944, in the amount of \$248.26. Exhibit Z, two checks, cashier's checks drawn on the Bank of America, Oakland,

one of them dated November 9, 1944, in the amount of \$1911.77, is to Barney's Clothes Shop, endorsed by Barney's Clothes Shop, and cleared through the bank in Los Angeles on November 15, it appears. The other check is dated December 12, 1944, cashier's check on the Bank of America in the amount of \$248.26, endorsed by Barney's Clothes Shop, deposited on December 20, 1944. (R. 688-9.) These items appear on Mr. Olender's books under Exhibit I—that's the purchase register—under date of October 30, 1944, purchase of \$1911.77, and another purchase on November 30, in the amount of \$248.26. I might correct myself. When I read this invoice, the first one that I referred to, as to the total of \$2111.67 that figure was as stated on the invoice, but the adding machine tape of the items on this page only total \$1911.77, an error of \$200 in addition. The actual amount of the check is for \$1911.77. These were entered in Mr. Olender's books under purchases under the dates of October 30th and November 30th, with charges to purchases and expense, and a credit to accounts payable, that is, a liability of Mr. Olender to make this payment. Now as testified by Mr. Olender, these cashier's checks were purchased from cash funds, not from store funds. Therefore the invoices had been recorded on the books as a purchase and the amounts owing had been recorded. As evidenced by these checks, they were paid for in 1944. (R. 689.) However, the books indicate that he owed this money at the end of 1944. In February of 1945 an entry is made in the general journal of Mr. Olender's books under date of February 28th—that is in the general journal, Exhibit J—charging—reducing accounts payable by total of \$6803.02, and credit-

ing Mr. Olender's capital account, the investment account, for \$6903.02, with an explanation, "To record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop". (R. 690.) The effect of that was, the books stated that at the end of 1944 Mr. Olender owed this amount of money. Yet we have shown on the Barney transaction, which is part of the \$6903.02, that that amount in fact had been paid by Mr. Olender with personal funds and therefore in February the store, February '45, the bookkeeper made an entry crediting his capital account and reducing the accounts payable which had been erroneously set up at the end of '44. (R. 690.) The original entry in Mr. Olender's books, general journal 17, under date of February 28 which I just read. I will repeat. The debit was to accounts payable, \$6903.02. The credit was to M. Olender investment. The explanation of that journal entry is to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop. That is taken from Mr. Olender's original books which were kept by his bookkeeper. (R. 692.) Referring back to Exhibit I, Purchase Register, Mr. Olender, page 22, under date of 1944, February 8th, an item of \$750 for purchases. There is also \$22.95 for freight, making total accounts payable \$772.95. Under date of February 3, \$425 for purchases, \$25 accounts payable—debit and credit. February 2, Money Back Smith, \$1035 purchases, \$13.57 freight, \$1048.57, credit to accounts payable. February 24, \$950.33 purchases, \$950.33 accounts payable. February 24, \$657 purchases, \$13.22 freight, \$679.31 accounts payable. March 15, \$468.88 purchases, \$11.77 freight, \$480—correction. \$11.70 freight, \$480.58 accounts payable. March 8,

\$318 purchases, \$318 accounts payable. March 2, \$68.25 purchases, the same amount, \$68.25, payable. Those items add up to a total \$4742.99, which, when added to the Barney purchases of \$2160.03, make a total of \$6903.02, which I just identified as being credited to Mr. Olender's capital account in February of 1945. These Money Back Smith purchases were posted from the purchases register into the accounts payable in the general register. They are a part of the total shown on this page, of \$14,452.24 of credits to accounts payable, and that items is posted in the accounts payable record as being owing at the end of 1944. (R. 693-4.) Assuming that the evidence supports the payments by cash by Mr. Olender, not from the store, for the Barney items and the Money Back Smith items, the amount of the overstatement of the accounts payable as of December 31, 1944, would be \$6903.02. That overstatement would increase his net worth by crediting him with the cash that had been used to pay for this merchandise. By increasing the net worth at the end of 1944, under the net worth method there would be a decrease in the net income as computed on net worth basis at the end of 1945. (R. 695.) The \$1000 check, Defendant's Exhibit G, deposited in his personal bank account January 10, 1945, and referred to as an outstanding check during that period, would increase the net worth of the defendant at the end of 1944 by \$1000. (R. 696.) Defendant's Exhibit X for identification would reduce the net income on a net worth basis for the year 1945 by \$1000. (R. 697.)

Counsel for the defendant put the following hypothetical question to the witness and received the following answer:
Q. Assuming in the year 1944 the defendant purchased

and received from Goodman 822 suits at \$25 each and the total of \$20,550 paid represented personal cash funds taken from his safe deposit box and that the sailors' suits were ultimately disposed of as follows: 1. 200 suits in 1945 sold through Leavy to Lerman for \$5000. 2. 280 suits in 1945 sold through Leavy for \$7000. The proceeds remaining in Leavy's hands until turned over to Saraga in August, 1945, as shown in Saraga's books. 3. 342 suits of an aggregate cost of \$8550 transferred into the stock of the Army and Navy Store, 20 suits being sold through the course of trade, and 322 suits being included in the store inventory as of December 31, 1945. Assuming further that the original purchase of the 822 suits from Goodman was not entered in the books of the Army & Navy Store as inventory before December 31, 1944, and that the \$5000 proceeds from the sale to Lerman was entered on the books of the Army & Navy Store as capital investment, the money having been deposited in the store bank account. Assume further that the \$7000 proceeds from sales by Leavy were returned to Mr. Olander in 1945, augmented by \$725 as represented by U. S. Exhibit 41, and as set forth in Schedule 1 of the survey that we passed out, which sum of \$7725 defendant turned over to Leavy for transmission to Saraga in 1945. Assume further that the sum of \$7725 had not been returned to the defendant until 1946 and was then deposited in his personal bank account. Based upon the foregoing assumptions, what is the effect of the Goodman transactions upon the defendant's net worth at the end of 1944 and 1945, respectively?

A. Based upon the assumptions in your question, the effect of the Goodman transaction in the net worth of Mr. Olender is as follows: In addition to the assets listed in the net worth computation made by the Government, Mr. Olender had an asset as of December 31, 1944 of \$20,550, which asset consisted of 822 sailors' suits in the basement, which were segregated and not included in the store inventory as of December 31, 1944, as shown by Exhibit N. That asset was not taken into account by the Government in their list of assets shown by the net worth statement. The Court. As of what time, Mr. Witness, \$20,550—as of what time? A. December 31, 1944. As of December 31, 1945 the net worth would have been \$7725 more due to at that time the Saraga check being in the possession of Leavy, at the end of 1945. The net effect of that on an income basis, net worth income basis, is that comparing on the Government's schedule is to reduce income in 1945 by \$12,825 and reducing the net income in 1946 by \$7725. (R. 711-713.)

(Thereupon Defendant's Exhibits W and Z for identification were received in evidence.)

ROLAND HELLMAN, recalled for the defendant:

I have read all the transcript in this case. I personally went to the Bank of America and examined these deposits of the taxpayer. These schedules I have made are my accounting interpretations of the testimony and the Exhibits in this case. (The document referred to here admitted in evidence as Defendant's Exhibit SA.)

(Certain summaries prepared by counsel for the defendant were admitted in evidence as U. S. Exhibit 51. (R. 887.))

(The witness testified from defense Exhibits AD, AF, AG, Z, AB, AC, and G in evidence. Testified to the entry item by item and summarized the Government's computations of the net worth of the defendant on December 31, for the year 1944 as \$191,002.07, for the year 1945 as \$260,113.29, and for 1946 as \$283,193.62. (R. 892-902.))

The witness then gave his explanation and computations as to what is claimed to be errors in the Government's computations and the facts and evidence on which he based his results. (R. 902-909.) That based upon the foregoing the appellant's net worth as of December 31, 1944 was \$241,495.06 (R. 909); that \$20,000 included in the Government's estimate of bonds had to be deducted therefrom and that defendant's net worth as of December 31, 1945 was \$271,463.72 (R. 910); that defendant's net worth as of December 31, 1946 was \$265,833.38 (R. 911); that according to the witness' computations the combined tax liability for the year 1945 was \$16,510.83 as against the tax reported on the returns of \$15,495.75 (R. 920); that the underpayment of tax for that year was \$1015.08; that the tax liability for the year 1946 was \$4,417.02 and the amount of tax actually paid by appellant was \$5,562.79, resulting in an overpayment of tax for the year 1946 of \$1,145.77. (R. 920.)

(The cross-examination of the witness Hellman will be found in the record from pages 940 to 1071.)

VERA MANGER, called by the defendant:

I have known Mr. Olender, the defendant in this case, about ten years. In 1943 I was employed as bookkeeper

by the Dorfman Hat Company in Oakland. Mr. Olender was a very good customer and they allowed me to set up his books for a couple of hours a week. (R. 824.) His set of books were very vague and I had to set them up myself; the books were inadequate. Defendant's Exhibit K, J, I and H in evidence are the books that I set up. The entries are in my handwriting. When I was employed by Mr. Olender he did not make any entries in those books; I made all those entries. (R. 824.) I took care of everything. He never told me where to put things in the book; I don't think he would know how. I recall that merchandise was very hard to get and I know that we sent out the checks before the merchandise and then they couldn't fill it, they would send the checks back. (R. 826.) At page 17 of Defendant's Exhibit J which is the general journal, there is an entry under date of February 28, 1945 reading "Account payable M. Olender." There is a debit to accounts payable and a credit to M. Olender investment account with an explanation to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop in the amount of \$6932. That entry is in my handwriting. This is an entry that when I went to pay the check, I found that he had paid that out of his personal account so then I debited the accounts payable and then credited his investment account. (R. 827.) In all the time that I was employed by the defendant he did not attempt to dictate the book-keeping policy to me. That was entirely my job.

4. Government's rebuttal.

R. L. McNAB, called on behalf of the Government, testified:

I am employed by the Bank of America in Fresno. (R. 929.) In response to a subpoena which was served upon me. I have brought with me from the Bank of America savings account records for the account No. 3942 in the names of Mrs. J. or Mollie Olender for the years 1942 to 1945, and the bank records pertaining to account 2146 in the name of Mrs. J. Olender for the year 1942; I also have with me savings account No. 126 in the names of Terrys Olender Gambor for the years 1942 through 1946; I also have with me all the ledger sheets and deposit tags for the commercial account of Mrs. Mollie Olender for the years 1943 through 1946. (R. 929-930.)

(The said records were admitted in evidence as one collective exhibit U. S. No. 52.)

The records in connection with No. 3941 in the name of Mrs. J. Olender reflect a withdrawal on February 3, 1942 in the amount of \$1000 and shows that it went into savings account 1246 in the name of Mrs. J. Olender. (R. 932.) The records show a withdrawal from account No. 3941 on March 31, 1943 in the amount of \$1000 which went into the commercial account of Mrs. J. Olender and a withdrawal of \$2000 from No. 3941 on January 6, 1944 which went into the savings account No. 126 in the names of Terrys Olender Gambor. (R. 932.) The records show a withdrawal from No. 3941 on December 15, 1944 in the amount of \$1000 and went into the commercial account of Mrs. J. Olender and a withdrawal on January 2, 1945 of \$3000 which went into the Terrys Olender

Gambor savings account No. 126. With respect to account 126 the records during the period in question show no withdrawals at all.

WILLIAM F. GAHURA, called by the Government, testified:

I am an employee of the Security First National Bank in Fresno and as such have access to the official records of the bank. (R. 937.) I have with me photostatic copies of records pertaining to a savings account in the name of Mr. J. Olender in addition to the ledger cards. (Admitted in evidence as U. S. collective Exhibit No. 53.) (R. 938.) The exhibit shows that on July 5, 1944 a withdrawal was made in the amount of \$2500 and includes a withdrawal slip. I cannot state what the ultimate disposition of that sum of \$2500 was. The records were mislaid or lost. (R. 939.)

MELBOURNE C. WHITESIDE, called by the Government:

I recall that a few days ago, His Honor expressed an interest with respect to purchases based on the sailor suits purchased by the defendant during the years 1944, 1945 and 1946. Last Monday the Government agents, together with Mr. Hellman, came in here and did some work on the purchase records in the form of invoices produced by the defendant. I have here some work sheets which summarize the work done at that time. These are carbon copies. At the time Mr. Hellman brought in the purchase invoices I went through each invoice, picked out those which indicated purchase of sailor suits, called them off to Mr. Hellman, and he made a tabulation and a carbon copy was made which was given to me. Those

work papers are in Mr. Hellman's writing. (R. 1085.) For the year 1944 we found that Mr. Olender had purchased 259 suits at a cost of \$6,713.50. The price for the great part appears to be about \$26.50. We did not work out an average. (R. 1086.) That schedule was prepared from invoices which were produced by Mr. Hellman. I accepted for the purpose of this schedule such invoices as were produced at the Court chambers by Mr. Hellman. In the year 1945 there were 1,578 suits purchased for a total cost of \$35,656; in the year 1946 he purchased 385 suits at a total cost of \$9,452. The invoices did not show sizes and we could find no record of sizes for any sailor suits purchased by the Army & Navy Store during the years 1944 to 1946 inclusive. (R. 1087-8.) In checking these invoices which were produced here in Court, I do not recall finding any invoices that were not recorded in the books. During the course of my investigation, Mr. Olender did not give me any invoices evidencing the purchase by him of sailor suits. The schedule now shown me, Government's Exhibit No. 25 for identification, is part of a sworn statement of assets and liabilities which was submitted to the Bureau of Internal Revenue just prior to the time I came into the investigation. (R. 1090.) I made a tabulation of Defendant's Exhibit AC, which is a ledger account of the bank account of Olender, and defendant's Exhibit AE which is a series of checks drawn on the same bank account of Milton Olender, a personal bank account. (R. 1095.) There were 14 of the 1944 and three of the 1945 checks not produced or not included in this pile. (R. 1095.)

We were unable to find any evidence whatsoever to indicate that the suits sold in 1945 had any bearing on the purchase in 1944, that is Goodman suits. (R. 1099.) On July 31 Mr. Olender purchased from M. Saraga 951 suits at \$25, total amount \$23,775. On August 28, he purchased 500 suits from Seagoing Uniform Company at \$18 per suit for a total of \$9,000. On November 6, he purchased 105 suits from Joe Asman at \$22 per suit, totaling \$2310. (A schedule of sailor suit purchases for the years 1944, 1945, 1946 in the handwriting of Mr. Hellman was admitted in evidence as U. S. Exhibit 54.)

We checked the five transfers from Mrs. Molly Olender's bank account to see whether there were withdrawals from those accounts through the close of 1946. The money which was transferred into the account Terrys, Olender, Gambor savings account 126, remained in that account. There was not withdrawals at any time. In fact, the money is still there. On account 2146 in the name of Mrs. J. Olender there are some small withdrawals but none in the amount of \$1000 for a period of approximately two months; later there is a \$1000 withdrawal. In the commercial account there are similar amounts which could be deemed a transfer out of the account. (R. 1101.) We discussed this matter with Mrs. Mollie Olender.

Thereupon the following proceedings occurred:

"Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes

of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

Mr. Hagerty. Well, if your Honor please, again we will enter an objection. The question is both leading and suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court. Overruled.

A. Yes, we made a determination on that.

Mr. Shelton. Q. What was that determination?

Mr. Hagerty. We enter the same objection, your Honor.

The Court. Overruled.

A. Our determination was that the gifts were not in fact made.” (R. 1102-3.)

DONALD A. JENSEN, called by the Government:

I am Director of the Department of Public Welfare of Fresno County. -

(The following testimony came in over the objection of counsel for the defendant.)

The Witness (continuing). In response to a subpoena I have brought with me the file of Mrs. Laura J. Foote from the official life of the Fresno Public Welfare Department, kept in the regular course of business. (R. 1124.)

Over objection of counsel for the defendant, the said file was admitted in evidence as United States Exhibit 55. (R. 1126.)¹³

¹³The admitting of this file into evidence and the full substance thereof is fully set forth in Specification of Error No. 10.

CLIFFORD F. CARROLL, called in rebuttal testified:

I produced two records of loans made by Milton Olender (from Bank of America), one in 1945 and one in 1946 (R. 1151); the date of the first application is July 11, 1945, it was a 3 month loan of \$30,000, the application states the funds were to be used to buy Naval uniforms and to liquidate part of the loan at maturity (R. 1152); the security Mr. Olender put was \$10,000 U. S. Treasury Bonds of 1951-52, \$13,000 U. S. Treasury Bonds of 1952-54, \$8000 Treasury Bonds of 1952 and \$1000 Treasury Bonds of 1956—total \$32,000. (R. 1153.)

The second loan became effective on August 22, 1946, maturity date 11/30/46, for \$10,000 (R. 1153); the application states it was to cover part of the purchase price of a new home; the collateral was \$10,000 U. S. Treasury Bonds. (R. 1154.)¹⁴

This is a deposit slip in the amount of \$15,000 dated June 1, 1945. (R. 1154.)¹⁵ It was deposited in the commercial account of Milton H. Olender, it was a cash deposit-currency. (R. 1155.)

This ledger card covers the savings account No. 35225 in name of Betty Olender from December 20, 1945 to September 7, 1951. (R. 1157; marked U. S. Exhibit 61.)

The witness then produced cashier's checks issued December 5, 1945 for \$10,000 and \$15,000 (R. 1159); also four cashier's checks dated May 31, 1945 (all checks marked U. S. Exhibit 63, R. 1160); a cashier's check dated June 5, 1945 for \$15,833.46. (U. S. Exhibit 64.)

¹⁴The loan application of 1945 and 1946 marked U.S. Exhibit 57.

¹⁵Deposit slip marked U.S. Exhibit 58.

The witness produced 9 cashier's checks each being for \$2250 or \$2350, each payable to George Goodman. (U. S. Exhibit 65, R. 1161-2.)

A check drawn on Bank of America, dated May 24, 1945, drawn by Army & Navy Stores, commercial account, payable to Milton Olender for \$15,000. (Defendant's Exhibit AQ, R. 1164.)

HUBERT C. MYTINGER, recalled on behalf of the Government:

In the computation made from the defendant's schedule as revised I computed the balance in the defendant's safe deposit box on July 11, 1945 as \$61,347.43, the balance of cash in the safe deposit box after the withdrawal of June 9. (R. 1207.) The same computation for August 22, 1946 is a balance of cash of \$17,939.76. If the non-deductible expenditure item of \$1340.40 was expended after the 22nd day of August, 1946, the cash figure would be \$19,280.16. (R. 1208.) Assuming that no record was kept by the defendant of amounts deposited in and withdrawn from his safe deposit box, and assuming further that the defendant had at least five sources of taxable income, and that the record of the deposits of the income from all sources have not been kept, and assuming that there is evidence that the defendant's business records do not reflect all his sales, and assuming that money was withdrawn from the defendant's business and used for business and other purposes not indicated on his records, it would be my opinion that it would not be sound accounting practice to assume that all unidentified or unreported deposits of cash by the defendant came only from his safe deposit box. (R. 1209.)

(This last testimony was admitted over the objection of defendant that it assumed facts not in evidence, was an attempt to usurp and invade the province of the jury, and called for an opinion upon a question of fact which it was for the jury to decide. This objection was overruled by the Court. (R. 1210.)

ROLAND HELLMAN, recalled by the defendant, testified:

In view of Mr. Carroll's testimony this morning, Mr. Mytinger was correct in as far as he went but he didn't cover the—he went—he covered this phase here and did not explain the result of the questions you asked him previously. In view of Mr. Carroll's testimony and his identification of the mark on the checks, the four cashier's checks were purchased then with proceeds from the store check 2396 which is in evidence here, Exhibit AQ. It was issued May 24, 1945 and cashed on June 1st, or exchanged on June 1st for these cashier's checks. However, this Exhibit, Government's Exhibit 58 showing a deposit of \$15,000 on the same date, June 1st, into Mr. Olender's personal commercial account, the purpose of which is clearly evident, to buy cashier's checks; U. S. Exhibit 64 to purchase life insurance \$15,833.46, which was covered by the stipulation as far as the asset was concerned. That is related, inasmuch as in working up this schedule we knew there were the two \$15,000 items, and schedule 4, to the extent that it detailed the four cashier's checks as having been purchased from the safe deposit funds, is incorrect but would also be incorrect then to the extent that it fails to take into consideration a transfer of \$15,000, presumably from cash in the safe deposit box,

into the personal bank account from which he purchased the life insurance. So it is a wash transaction. One \$15,000 item comes out; the other \$15,000 item goes in. So it washes out entirely. (R. 1223.)

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in denying appellant's motion for a judgment of acquittal made at the conclusion of all the evidence in the case. (R. 1234, 1319.)

Specification No. 2.

The evidence was insufficient to support the verdict of guilty on count one of the indictment.

Specification No. 3.

The evidence was insufficient to support the verdict of guilty on count two of the indictment.

Specification No. 4.

The evidence was insufficient to support the verdict of guilty on count three of the indictment.

Specification No. 5.

The evidence was insufficient to support the verdict of guilty on count four of the indictment.

Specification No. 6.

The Court erred in permitting the witness Charles R. Ringo to testify as a witness for the Government over

the objection of appellant that the relationship of attorney and client existed between the appellant.

The full substance of the testimony of Charles R. Ringo is set forth in the preceding statement of the case.

When the witness Ringo was first called by the Government appellant objected to the witness testifying on the ground that he was an attorney at law and the appellant was his client. (R. 112.) Ringo testified that he was a certified public accountant and an attorney at law admitted to practice in the California Courts. (R. 112-3.) That he was associated with the accounting firm of D. A. Sargent & Co., that in 1948 appellant came to the firm of Sargent & Co. and saw Ringo; that appellant first saw Mr. Sargent who turned him over to Ringo (R. 114); that as a result Ringo was requested to make out a net worth statement—to try and work out a comparative net worth statement—1942 through 1947 (R. 115); (here the witness produced his business card reading as follows: “Charles R. Ringo, CPA, Attorney-at-law, D. A. Sargent & Company, certified public accountants, 1212 Broadway, Oakland, California”. (R. 116); when Mr. Olender first talked to me he asked me if I was an attorney-at-law, and that he wanted an attorney-at-law who knew something about accounting; I told him I was and that I knew something about both subjects and he then retained me. (R. 116.)

Appellant again objected to the witness testifying “to any disclosure by this witness as to any affairs that he conducted or handled for defendant on the grounds of privilege” (R. 117), the Court overruled the objection. (R. 117.)

Ringo further testified that he was a specialist in tax matters and handled the legal accounting end of tax matters; that Mr. Olender hired him to look into his tax problems, whereupon the Court stated:

“The Court. The witness may testify under the circumstances. His testimony is to be limited to accounting matters. And if there be any matters involving the relationship of attorney and client, I will rule on those matters as and when they appear.” (R. 118.)

MILTON OLENDER, the appellant, testified as to this matter as follows:

When I learned that the United States was questioning my income tax declarations I went to Mr. Reinhard my banker and personal advisor and told him I wanted to get an accountant and a tax attorney. I did not want two men. (R. 423.) I wanted a combination of the two in one man. He said he knew such a man, that the firm of D. A. Sargent & Co. had a tax attorney and accountant as a partner of Mr. Sargent. (R. 424.) As I entered the door of the firm of D. A. Sargent, I read on the door: “D. A. Sargent” and underneath that “Charles R. Ringo, CPA, attorney-at-law.” I talked to Mr. Sargent and told him the type of person I wanted and I never again spoke to Mr. Sargent. (R. 424.) Mr. Ringo came to my store and I explained to him just exactly what I wanted. I told him: “Mr. Ringo, I understand you are an attorney as well as an accountant, and as such I have certain information that I would like to give to you.” (R. 425.) I then retained Mr. Ringo and carried on with him all my tax matters. The particular reason

why I wanted an attorney and accountant combined in one man was that in my net worth statement there are many items concerning my mother, who was 70 years old and not in good health, and I didn't want many of those items disclosed. (R. 426.)

S. E. REINHARD testified:

I am connected with the Bank of America in Oakland, I have known Milton Olender about 20 years (R. 311); I have counselled with him in various business transactions and have acted as his banker. About 1948 Olender told me he was having some difficulty with the Treasury Department; I suggest that he go to the firm of accountants in our building known as D. A. Sargent & Company and that one of the partners, Mr. Ringo, was a tax attorney. (R. 312-313.)

At the conclusion of the evidence appellant moved the Court for an order declaring a mistrial for the error in admitting the testimony of the witness Ringo (R. 1231), this motion was denied.

Specification No. 7.

The Court erred in sustaining an objection by the Government to the following question propounded to the witness Charles R. Ringo by appellant:

“Q. And at that time the relationship of attorney and client was set up?

Mr. Drewes. Well, I submit—I object to that, your Honor, as calling for the opinion and conclusion of the witness.

The Court. Sustained.” (R. 116-7.)

Specification No. 8.

The Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 45.

During the examination of Melbourne C. Whiteside, a government witness, the following took place:

“Q. Mr. Whiteside, in response to question asked by counsel you stated that Mr. Ringo had propounded questions to the defendant, one of which—the response to one of which set forth the amount of cash that the defendant had had in his bank vault at certain dates, is that correct?

A. That’s correct.

Q. And was that shown to you by Mr. Ringo?

A. That is correct.

Q. I will show you, Mr. Whiteside, a photostatic copy of a document and I will ask you if that is a copy of the statement, in questions and answers, that was shown to you by Mr. Ringo and to which you have referred in your testimony?

A. Yes, sir, that is the statement.

Q. Do you know where the original is?

A. No, I do not.

Q. Was the original ever given to you?

A. It was loaned to me but Mr. Ringo took it back and—

Q. You gave it back to Mr. Ringo?

A. That is correct.

Mr. Drewes. If your honor please, the Government will offer the photostatic copy of the identified document in evidence, limited strictly to the item referred to as item 19 ‘Analysis of use of cash in Vault’.

Mr. Lewis. Your honor, I object to that document going into evidence. He has identified it as coming

from Mr. Ringo. He has not identified any part of that document as coming from Mr. Olender.

* * * * *

Mr. Lewis. Your Honor, a further objection to it, it is a confidential communication. We note our objection to all this testimony.

* * * * *

Mr. Hagerty. And a further defect, your Honor, that it is purely hearsay, that is a hearsay document, and it has not been identified by the original writer, Mr. Ringo.

The Court. Overruled." (R. 250-252.)

The document, limited to Item 19, was admitted as U. S. Exhibit 45. Item 19 reads as follows: "Analysis of Cash in Vault—Decrease in 1944, \$6,000; Decrease in 1944 (Goodman deal 20550), \$19,000; Decrease in 1945, \$42,800; Decrease in 1946, \$7,200; Total \$75,000.

Specification No. 9.

The Court erred in admitting in evidence over the objection of appellant the following portion of the testimony of the witness Melbourne C. Whiteside, called and examined by the Government:

"Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of your discussions with Mrs. Mollie Olender, I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?

Mr. Hagerty. Will, if your Honor please, again we will enter an objection. The question is both leading and suggestive. It also is again calling for the conclusion and opinion of the witness, and partially based on hearsay.

The Court. Overruled.

A. Yes, we made a determination of that.

Q. (by Mr. Shelton). What was that determination?

Mr. Hagerty. We enter the same objection, your Honor.

The Court. Overruled.

A. Our determination was that the gifts were not in fact made." (R. 1102-3.)

Specification No. 10.

The Court erred in admitting in evidence over the objection of appellant, United States Exhibit No. 55.

The Government, in rebuttal, called one Donald A. Jensen as a witness, who identified himself as the director of the Fresno County Department of Public Welfare; he identified a file of papers as being the official records of his department and as being the file of one Laura J. Foote for an old age security pension, containing, among other documents, an affidavit of Betty Olender the wife of appellant. Appellant objected to the introduction into evidence of the file, which objection was overruled by the Court. (R. 1126.)

As the proceedings, objections and description of the documents are quite lengthy, we set forth the same in the Appendix hereto at page 1.

Specification No. 11.

The Court erred in instructing the jury as follows:

“You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant’s return and his actual income are indicated by the Government’s proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.” (R. 1392.)

To which instruction the appellant duly excepted. (R. 1401.)

ARGUMENT.

1. THE COURT ERRED IN ADMITTING IN EVIDENCE, OVER APPELLANT’S OBJECTION, U.S. EXHIBIT NO. 55.

Specification of Error No. 10.

The Government, in rebuttal, called the director of the Fresno County Department of Public Welfare who identified a file of papers as being the records of the application and proceedings of Laura J. Foote for Old Age Security payments from the State of California. (R. 1126.) The avowed purpose of the Government in offering these documents was stated by the prosecutor as follows:

“Mr. Drewes. I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant’s testimony that he received \$2,500 from Mrs. Foote which she had saved over a long period of time. There are

also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten-year period were made to himself and to his wife jointly. That, of course, goes to impeach that testimony. There is the purpose of the showing.” (R. 1121-22.)

Appellant objected to the offer on the grounds that the documents were hearsay, an attempt to impeach appellant’s testimony on collateral issues; that the whole scope of the documents were not within the issues framed by the indictment which covered 1945 and 1946 (R. 1126), which objection the Court overruled.

The entire matter with a description of each document is set forth in full under our Specification of Error No. 10. (See Appendix, p. 1.)

Summarized these documents are as follows: (a) Affidavit of Betty Olender, appellant’s wife, dated May 23, 1939, stating that she has no cash on hand, no money in bank, no postal savings, no funds in safe deposit boxes, no stocks, bonds or securities, no salary (R. 1137); (b) six reports of investigators for the Welfare Department; (c) five reports from banks relative to lack of deposits, etc., of Laura Foote; (d) three or more statements or

affidavits of Laura Foote showing no personal property in excess of \$500.

Repeatedly throughout the trial it was stated by the judge and counsel that the question of many of appellant's assets resolved into a question of veracity on the part of appellant. (R. 397, 541, 620, 628, 629, 1201, 1246.) At page 1246 the Court states:

“* * * and we come back to my original premise and my original thinking in this case, the beginning and the ending of the case is the credibility of the defendant.”

The government prosecutor made valiant use of these documents, to the great prejudice of appellant. The prosecutor at the beginning of his opening argument stated to the jury:

“In this particular case, the record is such, I believe, that it comes down to this, if you believe the defendant's explanation of these various complicated transactions, then, of course, he had no intent, and by his calculations there is no substantial understatement of income.” (R. 1252.)

The prosecutor used Betty Olender's affidavit to refute the fact that appellant had received money gifts from his father (R. 1267); the Welfare file to prove that Mrs. Foote did not have the \$2500 to give appellant (1306, 1316); again refers to Betty Olender's affidavit as refutation of gifts to appellant from his father (R. 1316); Mrs. Olender's affidavit again used (R. 1370) etc.

Clearly, if the jury found that appellant was testifying falsely as to the gifts from his father, the \$2500 from

Mrs. Foote, that he did not have large sums in his safe deposit box, and based these findings on the Welfare file of Mrs. Foote, the jury most probably disbelieved any other testimony given by appellant.

That Mrs. Foote's Welfare file was the rankest of hearsay is easily demonstrated.

Betty Olender's affidavit was not only hearsay, but constituted a violation of the law which prohibits a wife from testifying against her husband in a criminal case.

The entire file was incompetent as evidence under the law of California which makes such documents confidential and prohibits their disclosure except in a case dealing directly with a particular Old Age Security payment.

The entire matter deprived appellant of the right of cross-examination.

The file included six reports of investigators of the Welfare Department, reports from various banks and the filed statements of Laura Foote. No one of these persons was called as a witness. No right of cross-examination was accorded appellant. The very rule that prohibits hearsay testimony is based on the proposition that it deprives the accused of the right of cross-examination.

“The exclusion of hearsay evidence is based upon the principle that every litigant who comes into a court of justice has a clear right to have the witness against him brought into court face to face, so that he may be tested by cross-examination as to every fact concerning which he has given evidence.”

San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 317, 104 Pac. 999.

Yet these hearsay reports were used to prove that Mrs. Foote was practically penniless and, therefore, appellant was a liar.

A wife cannot testify against her husband in a criminal case. The Government could not do indirectly that which the law prohibited it from doing directly. As the Government could not call Betty Olender to testify against appellant, it could not indirectly do this by putting into evidence the hearsay affidavit of appellant's wife made in 1939—five years before the offense charged in the indictment. Betty Olender was not on trial.

There was no evidence establishing that appellant knew aught of his wife's affidavit, it was hearsay and inadmissible.

The entire file was incompetent as evidence under the law of California.

Section 118, *California Welfare and Institutions Code*, at time of trial, provided in part as follows:

“(Applications and records confidential.) Except as otherwise provided in this section, all applications and records concerning any individual made or kept by any public officer or agency in connection with the administration of any provision of this code relating to any form of public assistance for which grants in aid are received by this State from the United States Government shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of such provision of this code.

(Unofficial disclosure as misdemeanor.) Except as otherwise provided in this section, no person shall

publish or disclose or permit or cause to be published or disclosed any list of persons receiving any such public assistance. Except for purposes directly connected with the administration of such public assistance, no person shall publish, disclose, or use or permit or cause to be published, disclosed, or used any confidential information pertaining to an applicant or recipient. Any violation of this section is a misdemeanor. * * *”

A comparable situation was presented in the case of *United States v. Caserta* (3 Cir.), 199 F. (2d) 905, 910, where defendant objected to the introduction in evidence of his Selective Service questionnaire by the Government, the Circuit Court held as follows:

“The questionnaire involved here contained at the bottom a statement to the effect that the information was confidential except for certain specified uses by the government. We think it is a matter of importance that this assurance to registrants that the information they give is to be treated as confidential should be kept in good faith unless the registrant, himself, consents to its disclosure. It has been uniformly held that a third party cannot compel the production of these questionnaires unless the registrant consents. Now it is true that there is a regulation which permits the disclosure and examination of such information to the employees of the local board, medical advisory board and so on ending up with the phrase ‘proper representatives of the state director of selective service or the director of selective service, United States attorneys and their duly authorized representatives.’ 32 Code Fed. Reg. §605.32 (1943), as amended, §1606.32(a)(4) (Rev. 1951).

It is argued from this that since the United States attorney may read a registrant's questionnaire he may introduce it in evidence in a trial in which the United States is the prosecutor. If this were a case involving alleged violation of selective service law we might be forced to accept the argument. The same would be true if a man were being prosecuted for perjury for false statements in his questionnaire. See 32 Code Fed. Reg. §1606.35(a). But this case does not involve either one. It is a trial on an entirely separate matter. Just because the United States attorney can look at a piece of paper and get information from it certainly does not mean that he may bring it into court and show it to a jury in any criminal case. We think it may prove highly injurious to the operation of the selective service system if a registrant's confidential information is to be spread far and wide at the wish of local prosecutors. The admission of the questionnaire in this case was error."

In the *Caserta* case the Court assumed that the questionnaire would have been otherwise competent. Here, we have demonstrated that the entire file was incompetent for reasons wholly outside the foregoing code section; it was hearsay and, in part, violated the law that prohibits a wife from testifying against her husband.

2. THE COURT ERRED IN PERMITTING GOVERNMENT WITNESS WHITESIDE TO TESTIFY, OVER APPELLANT'S OBJECTION, TO HIS OPINION AND DETERMINATION THAT APPELLANT'S MOTHER HAD NEVER MADE CERTAIN GIFTS OF MONEY TO APPELLANT.

Specification of Error No. 9.

Appellant had testified that his mother had made six gifts of money to him during her lifetime. In rebuttal the Government called Melbourne C. Whiteside and propounded to him the following question:

“Q. Now, Mr. Whiteside, as a result of your checking the bank records in Fresno here in evidence and as a result of *your discussions with Mrs. Mollie Olender*, I will ask you whether or not, for the purposes of your report, you made a determination as to whether the six items represent gifts which were made by Milton Olender—strike that—which were made by Mrs. Mollie Olender to her son Milton?” (R. 1102.)

Appellant objected to the foregoing question on the ground, among others, that “It is again calling for the conclusion and opinion of the witness, and partially based on hearsay.” The Court overruled the objection and the witness answered: “Our determination was that the gifts were not in fact made.” (R. 1103.)

Just prior to being asked the foregoing question Mr. Whiteside had testified that he spoke to Mrs. Mollie Olender twice in 1948 (R. 1102); but the conversations were not given, as indeed they could not be because such testimony would be hearsay. Yet, despite the fact that the conversations between the witness and Mrs. Olender would be hearsay, the Court permitted the witness to give his opinion and conclusion based in part on such undisclosed hearsay.

Mr. Whiteside had identified himself as a "Special Agent in the Intelligence Division of the Internal Revenue" (R. 234), and he was so held out to the jury by the prosecution. The jurors were most apt to listen with respect to testimony coming from such a witness' mouth, and to pay great heed to his opinions and determinations. Whether appellant's mother had made substantial cash gifts to appellant was one of the important issues in the case, and to allow such a witness to give an opinion based partly on hearsay testimony was most damaging to appellant.

Furthermore, it is the general rule that no witness, lay or expert, can give his opinion on one of the main, ultimate facts to be decided by the jury. (32 *C.J.S.* p. 74, sec. 446; *United States v. Stephens*, 73 F. (2d) 695, 702.)

3. THE COURT ERRED IN ADMITTING IN EVIDENCE OVER THE OBJECTION OF APPELLANT, U.S. EXHIBIT NO. 45.

Specification of Error No. 8.

During the examination of Melbourne C. Whiteside, called by the Government, he testified that Mr. Ringo had told him that he, Ringo, had propounded questions to the defendant who had given Ringo a statement showing the cash on hand as of the beginning of the period and how it was dispersed. Thereupon the Government showed Whiteside a photostatic copy of a document and asked him if that is a copy of the statement in questions and answers that Ringo had showed him. The witness did not have the original of the document. Thereupon the Government offered Item 19 of the document in evidence to which appellant's counsel objected on the ground that the wit-

ness had only identified it as a document coming from Mr. Ringo and had not identified any part of that document as coming from Mr. Olender and that it was a confidential communication. The Court overruled the objection. (R. 250-252.)

Item 19 is entitled "Analysis of Cash in Vault" and then contains the following items:

Decrease in 1944.....	\$ 6,000.00
Decrease in 1944 (Goodman deal 20550)	19,000.00
Decrease in 1945.....	42,800.00
Decrease in 1946.....	7,200.00
	<hr/>
Total	\$75,000.00

The Government contended that appellant only had \$50,000 in his vault as of December 31, 1944 while appellant contended he had over \$72,000. The foregoing figures were used by the Government in argument to the jury to support the Government's claim of only \$50,000 being in the vault. (R. 1267, 1268.)

When Ringo was called as a Government witness he did not identify this Exhibit No. 45 or produce the original. Although the Government, when it offered the same in evidence, erroneously stated to the Court that Mr. Ringo's testimony had identified it. (R. 251.)

It should be manifest that the document was hearsay and that no proper foundation had ever been laid for its introduction into evidence. It was used with most damaging effect by the Government. It was also a privileged communication as will be demonstrated under our argument relating to the error in admitting any of the testimony of the witness Ringo.

4. THE COURT ERRED IN ADMITTING THE WITNESS CHARLES R. RINGO TO TESTIFY OVER THE OBJECTION OF APPELLANT.

Specification of Error No. 6.

When the Government first called Mr. Ringo as a witness, appellant objected to his testifying on the ground that the relationship of attorney and client existed between appellant and the witness. (R. 112.) Mr. Ringo testified that he was a certified public accountant and an attorney-at-law, admitted to practice in the California Courts (R. 112); that after appellant had come to the accounting firm of Sargent & Company, Mr. Ringo took over his affairs (R. 115); that Ringo's business card read in part as follows: Charles R. Ringo, C.P.A., Attorney-at-Law (R. 116); that Olender first asked him if he was an attorney-at-law and said he wanted an attorney-at-law who knew something about accounting; that after he had told appellant that he was an attorney and knew both subjects, law and accounting, *that appellant retained him*. (R. 116.) Ringo further testified he was a specialist in tax matters and handled the legal accounting end of tax matters, that he was employed to look into Olender's tax problems. (R. 118.)

MILTON OLENDER, the appellant, testified that when he learned the Government was questioning his returns, that he went to his banker, Mr. Reinhard, and told him he wanted to get an accountant and tax attorney; that he did not want two men but wanted the combination of two in one man (R. 423); that Mr. Reinhard said he knew such a man and referred him to the Sargent firm, of which one member was a tax attorney and an accountant (R. 424); that when he entered the door of the Sargent

firm, that there appeared on the door the following: Charles R. Ringo, C.P.A. Attorney-at-Law; that he talked to Mr. Sargent and told him the type of person he wanted; that Ringo came to his store and he told Ringo that he understood he was an attorney as well as an accountant and as such he had certain information that he desired to give to him (R. 425); that he then retained Mr. Ringo and carried on with him all of his tax matters; that the reason he wanted an attorney and an accountant combined, that in his net worth statements there were many items that he didn't wish disclosed. (R. 426.)

Mr. Reinhard testified that in 1948 he suggested that appellant go to the Sargent firm and that one of the partners, Mr. Ringo, was a tax attorney. (R. 312-13.)

It should be apparent from the foregoing that the relationship of attorney and client existed between Ringo and appellant. Appellant was particular in the kind of man he hired; he wished to procure an attorney-at-law and retained Mr. Ringo on the express understanding that there were confidential matters he was not to disclose.

The trial judge overruled the objections on the ground that his testimony was to be limited to accounting matters (R. 118) but it cannot be made to appear how Ringo's testimony as to the accounting could be segregated from the confidential information given to him by appellant.

It is true that Olender submitted to the Internal Revenue Department, U. S. Exhibit No. 24 entitled "Comparative net worth Statement" but the submission of this document to the Government at the Government's request

did not open the doors for Attorney Ringo to testify to any conversations or to any written statements made to him by Olender. An examination of the record shows that the Court's ruling was based upon the decision of this Court in the *Himmelfarb* case but that case lends no support to the ruling herein.

In *Himmelfarb v. United States*, 175 Fed. (2d) 924, 938, the situation presented was entirely different from the one at bar. In the *Himmelfarb* case the accountant was not an attorney-at-law; had never been employed as the defendant's attorney. He was called in at the request of defendant's attorney and was present at certain conversations held between defendant and his attorney. The Court held that under the circumstances disclosed by the record, the presence of the accountant was not necessary to the conference and that he did not occupy any different position than a stranger who was present and overheard the conversation between defendant and his attorney.

In the *Himmelfarb* case, this Court, at page 939, holds that if defendant had told certain privileged matters to his lawyer and the lawyer had breached this confidence by telling them to the accountant, that the accountant could not give testimony as to such matters. Here the attorney and accountant were one and the same person. Ringo as accountant could not disclose the information he acquired as an attorney.

In the instant case, Mr. Ringo was employed as an attorney and whatever communications were made to Mr. Ringo were privileged and confidential. To illustrate this, we again refer to U. S. Exhibits Nos. 26 and 45. It is on

these exhibits that the Government based its case, to-wit, that at the end of 1944 Olender only had \$50,000 in his safe deposit box. Of course, Exhibit 45 was inadmissible as it had never been identified by Ringo. Let us assume, however, that Ringo had identified the document. It was not one submitted to the Government. It was a mere statement made by a client to his attorney, who as an attorney was advising him as to his tax problems.

The importance of this point cannot be overstated. Without the testimony of Ringo the Government had no case.

In *City & County of San Francisco v. Superior Court*, 37 Cal. (2d) 227, 231 P. (2d) 26, Hession, the plaintiff, brought action for personal injuries; his attorneys employed a Dr. Catton to make an examination of plaintiff; defendant took Dr. Catton's deposition wherein he testified that he was the employee and agent of plaintiff's lawyers and refused to divulge the results of his examinations. Hession's attorneys contended that the results of the doctor's examinations were privileged under the attorney-client relationship. The California Supreme Court upheld this latter contention in a lengthy opinion running from page 234 to 238 of the California report. Among other things the Court stated:

“The privilege embraces not only oral or written statements but actions, signs, or other means of communicating information by a client to his attorney. (cases). ‘Almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be

whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential * * *, the privilege comes into play.' (8 Wigmore, *supra*, § 2306, p. 590.)"

Shortly following the foregoing the Court states:

"Had Hession himself described his condition to his attorneys there could be no doubt that the communication would be privileged and that neither the attorney nor Hession could be compelled to reveal it, even though a client is not listed in section 1881 (2) among those who cannot be examined. (cases) It is no less the client's communication to the attorney when it is given by the client to an agent for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client, or both."

On the following page the Supreme Court's opinion holds:

"Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed. (cases)."

See also *In re Ochese*, 38 Cal. (2d) 230, 238 Pac. (2d) 561.

So here, when Olender employed and retained Ringo as his attorney it was necessary that Ringo, in order to properly understand and handle Olender's tax problems, for which Ringo testified he was hired (R. 118), be advised of all business transactions, assets, liabilities, etc. of Olender. If Olender had retained independent counsel who in turn hired Ringo to advise them of Olender's affairs after examining Olender and his records, the things disclosed by Olender to Ringo would have been confidential and privileged. No different result can be arrived at merely because Ringo was Olender's attorney and also an accountant.

5. THE COURT ERRED IN SUSTAINING THE GOVERNMENT'S OBJECTION TO THE QUESTION ASKED OF THE WITNESS RINGO AS TO WHETHER THE RELATIONSHIP OF ATTORNEY AND CLIENT EXISTED BETWEEN HIM AND APPELLANT.

Specification of Error No. 7.

After Charles R. Ringo had been called by the Government and appellant had objected to his testimony on the ground of the relationship of attorney and client, the Court permitted appellant's attorney to examine Mr. Ringo. Ringo then testified that when he first talked to Mr. Olender, Olender told him he wanted an attorney at law who knew something about accounting and, after he told Olender he knew both subjects, that Olender retained him. Thereupon appellant's counsel asked the following question: "And at that time the relationship of attorney and client was set up?" (R. 116.) The Government objected on the ground that it called for the witness' opin-

ion and conclusion and the Court sustained the objection. (R. 117.) The question of whether the relationship of attorney and client existed between Ringo and appellant was a most important one.

In the case of *Collette v. Sarrasin*, 184 Cal. 283, 289, 193 Pac. 571, the California Supreme Court states as follows:

“It is proper to ask the attorney whether or not with relation to the transaction under inquiry he was acting as the attorney for the person making the statements. If either of the parties are not satisfied with the answer of the witness, the dissatisfied party can ask such questions as are essential to enable the court to determine whether or not the relationship existed.”

The question was proper, material and pertinent to the issue involved and it was error on the part of the Court not to allow the witness to answer the same.



6. THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

Specification of Error No. 11.

The Court gave the following instruction to the jury:

“You are further instructed that when in the trial on charges of income tax evasion discrepancies between the defendant’s return and his actual income are indicated by the Government’s proof, the failure of the defendant to offer explanation in any form may be considered by you in arriving at your verdict.” (R. 1392.)

To which instruction the appellant duly excepted. (R. 1401.)

As we understand the law the burden of proof was on the Government to establish the charge to a moral certainty and beyond a reasonable doubt. This burden carried with it proof of establishing the net worth of appellant at the beginning and end of the periods involved. (*United States v. Fenwick* (7 Cir.), 177 Fed. (2d) 488.) A mere reading of the foregoing instruction discloses that it shifted the burden of proof to the defendant and this cannot be done in a criminal case.

Furthermore, the instruction does not deal with the weight of any evidence offered on behalf of the Government but states that if the Government's proof *merely indicates some discrepancies* between the Returns filed by appellant and his actual income, that the burden is then on the defendant to explain away these discrepancies and a failure to do so is a factor that the jury have a right to consider in returning their verdict. Such is not and cannot be the law.

The burden of proof never shifts from the prosecution to the defense.

“A prima facie case is unknown in criminal procedure. In no condition of proof is it permissible to instruct a jury that it had become the duty of defendant to establish his innocence to obtain an acquittal.”

Ezzard v. United States, 7 F. (2d) 808, 811.

7. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CHARGE.

Specification of Errors Nos. 1, 2, 3, 4 and 5.

As pointed out in the opening pages of this brief and as conceded by the Government (R. 1357), the three main issues in the case were whether appellant had only \$50,000 and not \$72,000 at the beginning of the basic net worth period; whether appellant's beginning net worth period should have the additional credit of \$20,550 as the result of the Goodman suit transaction and whether the \$20,000 in bonds, which the Government contended were appellant's, in fact belonged to appellant's mother.

In the lower Court the case was argued to the jury by the prosecutor mainly on the theory that defendant's evidence in the foregoing regards could not be believed. However, the burden was on the Government to establish appellant's net worth as of December 31, 1944, 1945 and 1946. (*United States v. Fenwick* (7 Cir.), 1777 Fed. (2d) 488, 491; *Brodella v. United States* (6 Cir.), 184 Fed. (2d) 823; *Bryan v. United States* (5 Cir.), 175 Fed. (2d) 223, 225.)

We are aware of the language of this Court in *Remmer v. United States* (decided May 28, 1953) in which the "vitality" of the *Fenwick* case is questioned and the dissenting opinion in the *Bryan* case is looked upon with favor and where this Court in the *Remmer* case states:

"The evidence is sufficient if the jury is justified in finding therefrom, beyond a reasonable doubt, that there has been a wilful attempt to evade taxes."

Assuming that this Court is correct in holding that the *Fenwick* and *Bryan* cases too narrowly limited the

function of the jury in prosecutions based on the net worth method, nevertheless the burden was still on the Government to prove even an "approximation" of appellant's net worth to that degree of certainty required by law. The Government could not carry its burden of proof merely by throwing a mass of figures at the jury and asking the jury to surmise or conjecture from such mass that appellant had unreported income.

With these general thoughts in mind let us turn to the three foregoing items, following which we will discuss the two or three minor items specified in the opening portions of this brief.

Did appellant have \$50,000 or \$72,000 in his safe deposit box on December 31, 1944?

The Government contended that at the beginning of the net worth period appellant only had \$50,000 in his safe deposit box. This assumption and the facts on which it was based is testified to by the Government witnesses Mytinger and Whiteside as follows:

Mytinger testified that his computations as to appellant's net worth were based on the items contained in the stipulation (U. S. Exhibit 15) and that in respect to the cash in the safe deposit box, his computations were based on U. S. Exhibits 25 and 45; also on U. S. Exhibit 24. (R. 268.)¹⁶

¹⁶Exhibit 24 is the first sheet of the Comparative Net Worth Statement made by Mr. Ringo. This merely shows appellant's net worth as of December 31, 1941 and December 31, 1947. Exhibit 25 is the Government's computation as of December 31, 1941 and December 31, 1947. This exhibit credits Olender with \$75,000 in the safe deposit box or vault on December 31, 1941. There is no statement in there as to Olender's net worth on December 31, 1944.

Exhibit 45 on which the witness relied is the document that we claim was erroneously admitted in evidence under our Specification of Error No. 8. If this document was erroneously admitted in evidence as we contend, then the Government had no basis on which to claim that Olender only had \$50,000 in his safe deposit box.

Mytinger further testified that in computing defendant's net worth at the end of December, 1944 he used cash in the safe deposit box at \$50,000. (R. 277.)

Mytinger further testified that he never verified any single item constituting the basis on which he based his calculations (R. 1072) but that he merely relied on the work done by Revenue Agents Root and Whiteside.

Whiteside testified for the Government that he had the affidavit of Monroe Friedman before him but that in computing the cash on hand the Government only allowed the amount as claimed by the taxpayer and that he got that information through Mr. Ringo. (U. S. Exhibit 45.) (R. 247.) Further on Whiteside testified that their starting point on the net worth was the sworn net worth statement submitted by Mr. Olender and that as a breakdown of the cash involved they used the information they had obtained from Mr. Ringo. (R. 1174.)¹⁷

The affidavit of Monroe Friedman (admitted by stipulation) (R. 323) that on April 22, 1944 he counted the cash in appellant's safe deposit box and that there was over \$70,000 in the box; that on May 5, 1944 he again counted the cash and the same amount of money was there.

¹⁷Later on we will point out that the Government admitted certain errors in their computations which were in favor of appellant.

The Government conceded that the affidavit of Judge Friedman was correct and that there was over \$70,000 in appellant's safe deposit box in May of 1944 (R. 1263, 1359), but the Government on the last two pages of the record, while conceding the amount in May of 1944, denied that such amount was there on December 31, 1944. This poses the natural query: what became of the 22,000 odd dollars? If it was used in the purchase of other matters and things still in the possession of appellant at the end of December, then his net worth would be increased by this amount over the amount contended for by the Government. If the money was still in the safe deposit box, a like result would follow. In either event the Government's computation of appellant's net worth at the end of 1944 was shy \$22,000.

There is much evidence in the record as to how appellant acquired this money. He was subjected to long examination and cross-examination in this regard, all of which has become immaterial in view of the Government's concession that the affidavit of Judge Friedman was true and correct. It should further be remembered that Mr. Olender testified that before Judge Friedman went to the safe deposit box in April, Olender had withdrawn \$5,000 to \$10,000 therefrom to use on his trip to Texas (R. 375); that this money was not used.

The Government also relied on U. S. Exhibit No. 26 which document it had received from the witness Ringo. Ringo testified that when he first started in with the case he asked Olender to bring him estimates of his assets and liabilities; that he brought them to him; that Exhibit 26 was a summary of the items in Ringo's hand-

writing that Olender brought to him; that Olender took back the original but the information on the document was that which he had acquired from Olender (R. 134); that the document was entitled "M. Olender, comparative balance sheets 1941, 1946." This document contained an item of cash in vault as of December 31, 1944 of \$50,000. (R. 136.)¹⁸

Ringo further testified that Exhibit 26 was not intended by any means to be a full, final and complete study. (R. 149.)

These Exhibits 26 and 45 were prepared by Olender as mere estimates in 1948 of his condition as of December, 1944. When Mr. Hellman was called as a witness for the defendant he referred to Defendant's Exhibit AK, Schedule 4 as an itemization and tracing of the funds that went in and out of Olender's safe deposit box, beginning with the account of this cash by Judge Monroe Friedman.

Olender testified that during the years 1944, 1945 and 1946 his assets and sources of income came from the Army and Navy store, income from his rental property in Fresno, income from stocks and bonds, gifts, the money entrusted to him by Mrs. Foote and the money in his safe deposit box; that if he dealt in any cash transactions during this period, the cash would either have to come from his bank accounts or from his safe deposit box. (R. 752.)

There is no evidence in the record that Olender had any other sources of cash or income. Yet, despite this

¹⁸We have heretofore argued that all testimony of Ringo relative to communications made to him by Olender were incompetent under the attorney-client relationship rule.

fact, the Government erroneously argued to the jury that some of the amounts shown on said Schedule 4 of Defendant's Exhibit AK could have been unreported withdrawals from his business (R. 1270); that in the prosecutor's opinion Levy, Olender and Lerman were all involved in the illicit trading in sailor suits in violation of Government regulations; that they were dealing in the black market. (R. 1288.) In his closing argument the prosecutor again harangued the jury with the proposition that Olender was engaged in black market trafficking of sailor suits. (R. 1366.) All this without one word of testimony in the record to show that Olender was engaged in any illegal or illicit transactions.

When Roland D. Hellman was called as a witness for appellant, he explained Schedule 4 of Defendant's Exhibit AK in full (R. 895, 1223) together with the sources of information he acquired in making up the schedule. (R. 893-902.)

Every receipt and disbursement of Olender as outlined in the evidence is thus accounted for by the defense. There is no evidence to refute the foregoing facts, nor to base the inference or surmise or conjecture upon that Olender was receiving any illicit profits from any source. The purport of said Schedule 4 and the evidence relating thereto establishes that every expenditure and transaction made by Olender as a cash transaction could only have come out of the cash he had in his safe deposit vault. It follows that the basic net worth period relied on by the Government understated Olender's net worth by the sum of at least \$22,000.

Who owned the \$20,000 in bonds?

Mytinger testified for the Government that in his computations for 1945 of the Treasury Bonds amounting to \$82,000, he included in that sum \$20,000 worth of bonds that Mr. Ringo had testified belonged to appellant's mother. (R. 278.)

Lawyer-accountant Ringo testified for the Government that he examined the items in defendant's safe deposit box and asked Olender how he had acquired them (R. 128); that he made an inventory of the contents of the box (R. 137) and that he had a memorandum showing that the bonds were held for appellant's mother, 2 $\frac{1}{4}$ % Treasury Bonds listed as \$20,000 worth. (R. 137.)

Appellant testified that in 1944 his mother came to stay at his home and she brought with her \$20,000 in currency; that they opened a safe deposit box and put the money in the box (R. 366); that as a result of certain communications from his mother he subsequently invested that money in Government Bonds; that he first recommended that she invest the money in Bank of America stock (R. 367); that following correspondence with his mother, he made investments for her by the purchasing of Treasury Bearer Bonds and he placed them in the safe deposit box. (R. 531.) There is no evidence in the record contradicting the foregoing. The bonds were in the safe deposit box earmarked as belonging to appellant's mother and appellant testifies to such fact.

The only evidence on which the Government relied to refute the foregoing was that in 1947 appellant had

given Mr. Ringo some data for the preparation of his 1947 and 1948 tax returns; that for 1947 he reported interest paid as being \$1225 and for the year 1948, \$775. (R. 163-4.) Ringo testified that interest at $2\frac{1}{4}\%$ on \$20,000 would equal \$450 which was the differential between the two amounts of interest reported. (R. 164.) The entry of \$1225 on the 1947 list was in the handwriting of Ringo and not appellant. (R. 161.)

There is no evidence in the record to show that any interest on these bonds of \$20,000 was ever included in appellant's tax returns for years preceding 1947 or for years after 1947. If appellant used the interest in the year 1947 it was proper that he should include it in his return. Ringo did not know on what bonds this interest was paid; they were properly earmarked in the safe as the property of appellant's mother and the Court so understood the testimony. (R. 160.)

In view of the foregoing, the Government was in error in including these \$20,000 worth of bonds among the assets of appellant and its computation of \$82,000 should be reduced to \$62,000.

The Goodman transaction adds an additional \$20,550 to appellant's net worth.

In Defendant's Exhibit AL (see appendix), there is a chart explaining the entire transaction relative to the Goodman transaction as to the purchase of 822 sailor suits from Mr. Goodman. This chart shows the withdrawal of the money from the safe deposit box, what was done with the money and also what was done with the suits, how they were sold and the balance remaining

in the stock of appellant. Mr. Hellman explained this chart in full. (R. 586-593.) The truth of this transaction does not depend solely on the testimony of appellant but is corroborated by witnesses, cashier's checks, etc.

LOUIS LEVY, called by the Government, testified in substance that in 1944 he made arrangements with George Goodman by which he purchased about \$20,000 worth of sailor suits for appellant (R. 195); that these suits were subsequently delivered to appellant, whereupon he complained to Levy that the sizes were not what he bought; that though the suits were marked as small sizes, they were in fact large sizes; that subsequently he disposed of 200 of these suits to Mr. Lerman because Lerman had a tailor who could cut down the suits (R. 196-7); that he sold other of these suits from Goodman for Olender totaling about \$7,000, which latter sum he took to New York for the purpose of buying additional suits for Mr. Olender from a man named Saraga.

The Government established the purchase in 1944 of cashier's checks totaling \$20,550, all payable to Goodman. (R. 1161-2.)

Olender testified that he did not directly enter into any transactions with George Goodman in New York but conducted the same through Mr. Levy; that as a result he drew \$20,550 from his safe deposit box and made out cashier's checks payable to George Goodman (R. 387); that the uniforms received from Goodman were not reflected in his inventory as of January 1, 1945; that as of January 1, 1946, \$8,000 of them were reflected and in

1947 \$2,000 reflected in his inventory (R. 387); that the uniforms did not correspond with his order; that he had ordered uniforms of small size whereas the uniforms he received were all of large sizes; that he could not sell them as he didn't have a tailor who could cut them down (R. 398); that he complained to Levy; that Levy sold 200 of these suits for him at cost and he deposited the \$5,000 in his store account; that in July or August of 1945 Levy disposed of about 280 suits for \$7,000 and took that money to New York and gave it to Mr. Saraga as a deposit on suits which Saraga did not deliver and the funds were returned at a later date (R. 399); that there were 342 suits left after selling 200 to Lehrman and 280 which Levy disposed of; that of those 342 suits he had sold 20 in his store and put the money in his cash register; that at the end of the year 322 suits were included in his inventory. (R. 411.)

It is of importance to note that during the course of the trial, in proceedings before the judge out of the presence of the jury, the prosecutor called on Mr. Mytinger to explain the Government's position and Mr. Mytinger in response stated: "I believe there is no denying that it was \$20,550 that went out in 1944. I think it has been assumed that it went out for sailor suits." (R. 627.)

Olender further testified that he did not deposit this \$20,550 in his business account and then sent a business check to Mr. Goodman because he had no assurance he was going to get any suits at all and besides, *Mr. Goodman wanted cashier's checks*; that he didn't enter those

purchases on his books at that time because when the merchandise arrived it was unsatisfactory and he wanted to return it immediately (R. 476-7); that he didn't pick up the suits in his inventory at the beginning of 1945 because they were in an indefinite state and he just let them stay there waiting the outcome of Mr. Levy's transactions in trying to sell or dispose of them. (R. 484.)

The prosecutor attempted to wipe this entire transaction aside by arguing to the jury that the Goodman sales invoices were pure phoney's and that Levy, Olender and Lehrman were all engaging in black market activities. (R. 1288.)

In his closing argument the prosecutor stated that the entire Goodman transaction occurred in 1944; that Olender sold the suits and put the money back in the vault. (R. 1368.) The prosecutor made this latter statement despite the fact that Mr. Lehrman testified and his checks corroborated his testimony that in purchasing the 200 suits from Mr. Levy, it was done in May of 1945 and Levy testified that he sold the additional suits for appellant in 1945.

As these suits were purchased in 1944, were still in appellant's possession at the end of that year, they should properly have been included in his net worth statement, thereby increasing the amount of net worth, as of December 31, 1944, as computed by the Government, by the additional sum of \$20,550.

The transactions with "Money Back Smith" and "Barney's".

These transactions relate to certain items in the written stipulation as to appellant's assets and liabilities. (U.S. Ex. 15, see appendix.) Thus the stipulation shows that on Dec. 31, 1944, the Army & Navy Store had in bank the sum of \$19,881.55, after deducting outstanding checks, and accounts payable of \$14,363.70; the latter figure including the total sum of \$6903.02 owing to Barney's and Smith's.

The evidence established that the amount relating to Money Back Smith was \$4,742.99 and Mr. Lorenzen, of that establishment produced the receipted invoices for this amount showing payment in 1944. (Def. Exhibits AM and AM-1.)

As to the Barney transaction, Olender testified that the two cashier's checks (Defendant's Exhibit Z) dated Dec. 12, 1944 for \$1911.77 and one for \$248.26, made out to Barney Clothes Shop, were mailed to Mr. Barney at his request. (R. 604.)

The check for \$1911.77 cleared the Los Angeles Bank on Nov. 15, 1944 and the check for \$248.26 cleared the Los Angeles Bank on Dec. 20, 1944. Each of these checks is endorsed by Barney's Clothes Shop. (R. 688-9.)

Vera Manger, appellant's part-time bookkeeper, testified that in Defendant's Exhibit J, the general journal, there is an entry under date of Feb. 28, 1945 to the effect that there is a debit to account payable and a credit to M. Olender investment account with an explanation to record cash payments covering purchases from Money Back Smith and Barney's Clothes Shop in the sum of

\$6,932; that such entry was made because when she went to pay the check, she found that Olender had paid that out of his personal account so she then debited the accounts payable and credited his investment account. (R. 827.)

The prosecutor, in arguing to the jury admitted the Barney transaction, but denied the validity of the Money Back Smith transaction. (R. 1260.)

The result is apparent. As of Dec. 31, 1944, there is an overstatement of accounts payable of \$6,903.02, which would increase his net worth by that amount; by so increasing his net worth as of Dec. 1944 there would be a decrease of his net worth as of Dec. 31, 1945.

Other errors in Government's net worth computations.

There are many other errors in the Government's computations. We will but briefly refer to one of them, as we believe that the foregoing is sufficient to establish that the computations are insufficient to meet the requirements of the law as to the certainty with which the prosecution must establish the appellant's net worth at the beginning and end of the net worth periods.

If the Government need only prove an "approximation" in this regard; then the defendant need only prove his case by an "approximation".

The Asturias stock transaction.

The evidence, as above outlined in the statement of the case, shows that Olender made two payments to the Asturias Corporation of \$5,000 each. The Government contended that the second payment must be used in com-

puting appellant's net worth. However, the record establishes that Olender eventually received stock for this payment and that the stock was valueless.

Mr. Mytinger, the Government's witness, in reply to a question by the Court stated:

"The Court. You made a distinction, at the outset of your testimony, between net worth and expenditures of a capital nature, did you not, wherein you stated that if the stock had no value in 1946, and it appeared that this gentleman invested \$10,000 in the company, Asturias Company, notwithstanding, would you set it up in the net worth?"

The Witness. No, I would say if it had no value, your Honor, and if it were included in his net worth statement representing an investment it would then be allowed below as a loss on worthless stock." (R. 279.)

If, as the evidence establishes, the stock was worthless what change would be made in Olender's net worth by including the face value of the stock and then deducting the same amount as a loss? Under such circumstance neither the addition to or omission from the net worth statement would change the totals.

Summary.

Practically all the items used by both appellant and the Government are contained in the stipulation on file. (Ex. 15.) The Government's stand is set forth in Mr. Mytinger's testimony as follows: "The evidence relied upon with respect to a very few items is contained in the stipulation, Government's Exhibit 15." (R. 268.) That in addi-

tion thereto the Government's computations included the Asturias stock items, the cash in the safe deposit vault and non-deductible expenditures of accounts paid to I. Magnin and Co. and the Gray Shop. (R. 269.) These latter two items, paid in 1946 amount to \$4,031.42.

Mytinger's computations are as follows (R. 269-273):

The net worth of Olender for Dec. 31, 1944—\$191,002; for 1945—\$260,113; for 1946—\$283,193. But the foregoing arguments demonstrate that Mytinger's computations are erroneous. Adjust the same by the true amount of cash in the safe deposit box on Dec. 31, 1944, adding the sum of \$20,550 for the Goodman suits, deduct the \$20,000 in bonds from the net worth as of Dec. 31, 1945, add the value of 322 sailor suits to the costs of operation in 1945 (the suits were taken in inventory but no entry as to costs was made) adjust the payments of \$6,903.02 to the 1944 net worth, the payments made to Barney's and to Money Back Smith, disallow the Government's contention that an additional \$5,000 must be considered relating to the second Asturias stock payment, and we have a situation where none of the net worth computations are legally sufficient to base any computations upon.

Mr. Hellman, for the defense, correctly computed the entire matter, taking into consideration the foregoing major items and some minor items as follows: The net worth of Olender as of Dec. 31, 1944—\$241,495, as of 1945—\$271,463, as of 1946—\$265,833. (R. 909-911.) That the combined tax liability for 1945 was \$16,510.83 as against tax reported of \$15,495.75; that the combined tax liability for 1946 was \$4,417.02 as against tax actually

paid of \$5,562.79—an overpayment of \$1,145.77. (R. 920.)

CONCLUSION.

For the foregoing errors in the admission of prejudicial evidence over the objections of appellant, in the Court's instruction to the jury duly excepted to and to the insufficiency of the evidence to support the charges, the judgments should be reversed.

Dated, San Francisco, California,
July 20, 1953.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.



Appendix

SPECIFICATION OF ERROR NO. 10.

Amplification thereof by portions of the record appearing in Volume III, pp. 1120 to 1139, testimony of Donald A. Jensen, showing identification of documents, objections of appellant, description of documents admitted as U.S. Exhibit No. 55, etc.

DONALD A. JENSEN, called as a witness for the Government, sworn.

The Clerk. Please state your name, your address and your professional calling to the Court and to the jury.

A. I am Donald A. Jensen, director of the Fresno County Department of Public Welfare. I reside at 4505 Madison Street, in Fresno, California.

Mr. Hagerty. Might I suggest, counsel, at this time, as I understand the purpose of the Government is to introduce or to offer into evidence certain records which may or may not be admissible, and to guard against error in the record, might I suggest that we present our side of the position in reference to the admissibility then in the absence of the jury, and since it is close to the time for the afternoon recess, might we do that now?

The Court. All right. I have no objection.

The jury is excused for the afternoon recess, and take a brief recess with the same admonition, ladies and gentlemen.

(Following proceedings outside the presence of the jury.)

Mr. Hagerty. As I understand the Government's position, the Government seeks to offer into evidence at this time certain affidavits in reference to the procurement of an old age pension for Mrs. Foote.

The Court. This matter was referred to previously in our colloquy concerning the admissibility of the affidavits, as well as the affidavit submitted by Mrs. Olender.

Mr. Hagerty. As I take it, and I believe I'm right—Mr. Drewes, you tell me—

Mr. Drewes. I will make a statement. There are in these files a number of form replies from various banks, your Honor, public welfare, Fresno, the earliest one is 1939 through 1942, by which we seek to establish that Laura Foote had no cash in banks over that period of time. You will recall defendant's testimony that he received \$2,500 from Mrs. Foote which she had saved over a long period of time. There are also a number of reports reflecting much the same thing, which are filled out by the various investigators, as I take it, social workers from that department, in which successive dates are shown the assets of Mrs. Foote. It goes to the same point. And there is finally the affidavit of Mrs. Betty Olender, which is dated in May of 1939, in which she states that she has no cash in banks and no cash in—I think specifically in safe deposit boxes.

Your Honor will doubtlessly recall the defendant also testified that the gifts made over the ten year period were made to himself and to his wife jointly. That of course goes to impeach that testimony. There is the purpose of the showing.

Mr. Hagerty. Well, if your Honor please, of course it is perfectly conceivable that a gift could be made to the husband and the wife not have knowledge of it.

Mr. Shelton. That is a matter of rebuttal evidence, if your Honor please.

Mr. Hagerty. But this covers a period of time prior to the indictment, 1939, and in the year 1943, by one of these records itself, February 1943, the old age pension was discontinued as relatives assumed all the responsibility as of February 23, 1943, which antedates the inquiry that we are concerned with here, 1945 and 46.

Mr. Drewes. There is no question but that these documents pertain to a period which antedates the indictment. However, they are material to the issues which I have just stated as to what happened between 1930 and 1940 by the defendant's own testimony.

The Court. During the years——

Mr. Drewes. ——When these gifts were——

The Court. ——were accumulating or allegedly accumulating.

Mr. Drewes. And also the \$2,500 which she allegedly accumulated over the period of years by his testimony.

Mr. Hagerty. The defendant has testified here that even his sister didn't know of these gifts during the period of time that it was going on.

Mr. Drewes. Well, those are out of the record, your Honor.

Mr. Hagerty. No, they are not.

Mr. Drewes. Those are matters to be rebutted.

Mr. Hagerty. It was on the record, the testimony of the defendant.

The Court. I think the documents are relevant.

Mr. Hagerty. I think that they are collateral impeachment, your Honor, at best, because there is not any affidavit there of the defendant.

(Further argument and discussion concerning the records of the Department of Public Welfare, Fresno County.)

The Court. The objection will be overruled.

(The following proceedings had in the presence of the jury.)

Mr. Drewes. Q. Mr. Jensen, you are the director of the Fresno County Department of Public Welfare?

A. I am.

Q. And how long have you held that position?

A. Since June of 1947.

Q. In response to a subpoena that has been served upon you have you brought with you the file of one Laura J. Foote?

A. I have.

Q. And is that file from the official files of the Fresno County Public Welfare Department?

A. It is.

Q. Was it kept in the regular course of business?

A. Yes, it was kept in a locked file room.

Q. As the director, are you the custodian of those files?

A. Yes, sir.

Q. May I see the file?

A. (Handing counsel.)

Mr. Drewes. Do you wish to examine them? (To counsel.)

Mr. Drewes. The Government will offer the files in evidence at this time, your Honor.

Mr. Hagerty. At this time, your Honor please, for the purpose of the record we will enter our objections to the admission of this file into evidence on the grounds that

it is an attempt to collaterally impeach the defendant on immaterial matters; it is hearsay; it involves statements of—

The Court. Counsel, I would suggest, without interrupting your objection, counsel, I would suggest that you offer such relevant or assertedly relevant documents as may be applicable or have a bearing on the controversy.

Mr. Drewes. I have given some thought to that problem. This is what I propose to do. I have before me photostatic copies of the documents in that file which the Government believes to be pertinent.

The Court. Why not offer the file for identification merely? Then if you have photostatic copies of certain abstracts from the files, then offer your photostats independently with the stipulation that they are true and correct copies of the items in the file, and as I indicated to you earlier, I will admit those subject to your objections. But the matter of offering the whole file should be done merely for identification.

The Clerk. U. S. Exhibit Number 55 for identification only.

(Thereupon the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, marked for identification U. S. Exhibit Number 55.)

Mr. Drewes. Mr. Jensen, I show you a number of photostatic copies of documents and ask you if you have examined them?

A. I have examined them.

Q. And are those true copies of the documents which are in the file which you have just identified?

A. They are.

Mr. Drewes. May it be stipulated, counsel, that these documents, the photostats just identified, may be substituted for the file which has been marked for identification?

Mr. Hagerty. We would so stipulate, subject to our objection to their general admission into evidence, your Honor.

The Court. Now you state your objection.

Mr. Hagerty. We will object to their admission into evidence on the grounds they are hearsay, it is an attempt to impeach the defendant's testimony on collateral issues; furthermore that the whole scope covered by the documents in question at the dates the period covered within this indictment which is, namely, 1945 and 46, and the base year of 1944, and is not within the issues framed by the indictment.

The Court. And the objection is overruled.

The Clerk. U. S. Exhibit Number 55 in evidence.

(Thereupon photostatic copies of extracts from the file in re Laura Jane Foote, Department of Public Welfare, Fresno County, received in evidence and marked U. S. Exhibit 55.)

* * * * *

Mr. Drewes. I will describe each document, ladies and gentlemen, and then simply read from it those parts as I have indicated which I think are pertinent to the issues here. As I stated before, some of them are very extensive and very detailed.

The first document is entitled "Certificate of verification of eligibility which must accompany application for old age security" and it is dated the 15th day of May,

1959. There appears much, a considerable amount of data with respect to Laura J. Foote.

The date is—counsel advised me I stated the wrong date. The date is May 15, 1939.

There is a good deal of personal data in this document referring to Laura Jane Foote. One item is “Number 7” as follows:

“Has personal property value \$152.09, including \$152.09 cash in account with daughter.”

And that is signed by Edith V. Forest, County Visitor.

The next document “Report of Investigation, old age security.”

“Applicant’s name: Laura Jane Foote.

“Address: 2914 Kearn Street, Fresno.”

And again there is a good deal of data here.

“Real property: None.

“Personal property: (Cash, mortgages, trust deeds, stocks, bonds, chattels)

“Owned by applicant: None.

“Insurance: None.”

The last item on the first page is entitled “Responsible relatives: (Spouse and adult children)” and there is noted there six children, and the name of each is given. The last is Betty B. Olender, address: Oakland; relationship: Daughter; “Form AG. 14 filed; yes. Household income: \$150;

“Number of dependents: Four.

“Applicants’ present income from relatives:

“Housing from daughter, \$7.00.”

It is signed Edith V. Forest and it is dated May 15th, 1939.

The next document is entitled "Renewal Application, Old Age Security, year beginning June, 1940."

"County, Fresno.

"Full name of Applicant: Laura Foote.

"Section V. Changes: Have any changes occurred in the following for you or your spouse since last report:

"Property Holdings: No.

"Property Valuation: No.

"Property Encumbrances: No.

"Savings or cash on hand: No.

"Personal Property: No.

"Stocks, bonds, other securities: No.

"Earnings: No.

"Insurance: No."

That is signed Laura Jane Foote, and the date is August 7th, 1940.

On the back is the notation in longhand:

"Conditions remain the same. Recommend that aid continue."

Signed Dorothy Blakely, County Agent.

The Court. What is the date?

Mr. Drewes. That is the same date, August 7, 1940. It is the reverse form which I just—from which I just read.

The next report is captioned "Alameda County Charities Commission, Property Report."

“Date: January 17, 1940.

“To: L. Burrill.

“Case No. 36458. Name: Foote, Laura Jane.

“Address, 351 Fairmount Avenue, Oakland.

“The property at above address is assessed to Emma L. Busby. We are unable to locate any property in the following names and no transfers appear on record since July 1, 1937:

“Laura Jane Foote.

“The above information is taken from the County records as of the following dates:

“Tax Collector’s records as of March 1, 1938.

“Assessor’s records as of date of transfers in Plat Books.”

That is dated January 17, 1940, and the signature I cannot read.

Q. Can you locate that on your records, your original files?

A. Pardon me. What date?

Q. Alameda County Charities Commission, January 17th, 1940.

A. I have the original here.

Q. And by whom is that signed, Mr. Johnson?

A. It looks like P. F. Holtzknecht.

Q. Thank you.

The next document is entitled “Recipient’s Affirmation of Eligibility for Old Age Security.”

It reads in part as follows:

“I, Foote, Laura Jane, residing at 2914 Kern, Fresno, herewith affirm my believe that I am eligible for old age security, to wit:

"I do not own real property with an assessed value in excess of three thousand dollars.

"I do not have personal property in excess of five hundred dollars.

"I have acquired personal property consisting of none since my last application for old age security.

"I have disposed of personal property consisting of no change since my last application for old age security.

"Earnings: None.

"Rentals or proceeds of sale of property: None.

"Annuities or insurance: None.

"Stock dividends: None.

"Interest: Interest on deposit approximately \$150 only.

"I have received during the the past year other than old age security income from following sources: None."

That is signed Laura Jane Foote.

"Subscribed and sworn to before me this 16th day of June, 1941, Alice M. Hall, Deputy County Clerk."

Now on the reverse of that form is "County Report of eligibility investigation:

"Real property: Verified information and source thereof. Property search on file. No property owned.

"2. Personal Property: Verified information and source thereof: Bank of America, Oakland.

"Savings Account 46457—\$152.09 with Betty B. Olander."

Dated June 30, 1941, signed Alice M. Hall, County Investigator.

The next document is in the form of a letter in reply. It is a prepared form on the same document. It is

entitled "Fresno County, Department of Public Welfare, Fresno, California, June 17, 1941."

"Mrs. Laura Jane Foote.

"Dear Madam:

"All income and resources are to be taken into consideration in computing grants for blind aid and old age security as of July 1, 1941. It is therefore necessary that we have certain information at once so that we may complete our records. Please answer the following questions carefully and completely, sign and return to this office immediately:

"Alice M. Hall, social worker."

And then follows the part for the reply:

"What are your average monthly earnings: None.

"Do you receive cash or free room and board: You are taking \$7.00 per month out of my pension for room rent.

"(7) Do you have savings, postal savings or stocks from which you expect an interest or dividend payment in July? No."

And that is signed Laura Jane Foote and it is stamped as having been received on June 22, 1941. As I stated before, the date of the original letter was June 17, 1941.

The next document is entitled, "Recipient's Affirmation of Eligibility for Old Age Security."

"I, Laura Jane Foote, residing at 2914 Kern Street, City Fresno, County of Fresno, California, herewith affirm my belief that I am eligible for old age security, to wit:

"I do not have personal property in excess of \$500.

"I have acquired personal property consisting of none since my last application for old age security.

“I have disposed of personal property consisting of \$150 savings since my last application for old age security.”

And then there are similar questions:

“Earnings: None. Rentals or proceeds of sale of property: None.”

“Annuities or insurance: None. Stock dividends: None. Interest: None.”

That is signed Laura Jane Foote, and “Subscribed and sworn to before me this 17th day of June, 1942, Faye Clark, Deputy County Clerk.”

And again on the reverse side of this form, as in the earlier form that I read to you, is the “County Report of Eligibility Investigation.”

“1. Real property: Verified information and source thereof. According to this statement she has no real property. Property search shows no recordings to 5/27/1942, no assessments to 5/29/1942.

“2. Personal property: Verified information and source thereof. Is claimed no personal property except her clothing and personal effects.”

And that is signed Faye Clark and is dated the 29th of June, 1942.

The file contains a number of forms which are entitled “Authorization by Application for Financial Investigation.” I will read the first to you and that, of course, will suffice to describe them all.

“To: Any bank, trust company, postal savings department, Building and Loan Association, trust officer, insurance company or other financial institution.

“The undersigned who have applied for, or receiving, aid from the Fresno County Department of Public Welfare, hereby authorize you to furnish said Fresno County Department of Public Welfare any information in your possession with reference to any bank accounts, postal savings, policies, deposits or money in your institution now or hereafter to my credit.

“Our case No. 3630.”

It is signed Laura Jane Foote. Address: 2914 Kern Street, Fresno, California.

And then there is a section, the last half of this form, entitled “Returns: Bank of America, Oakland, savings account No. 46457, Mrs. L. J. Foote (2916 Kern Street, Fresno) joint with ‘Betty B. Olender or M. H. Olender’. Present balance, \$152.09.”

That is dated May 5, 1939.

Now the next similar form, also signed by Mrs. Foote, does not itself bear a date but the return section is as follows:

“Security First National, Fresno, 5/10/39. No funds.

“Bank of America—Fulton 5/23/39, no funds.”

Mr. Jensen. “Fulton” is that a branch in Fresno, the Bank of America?

A. That is one of the branches of the Bank of America.

Incidentally, Your Honor, I might explain these forms. At the time we sent out—we got the applicant’s signed statement releasing such information and then this form was cleared through all the major banks in Fresno, just one right after the other, to see if there was any funds on deposit which had not been reported. That is why there is a series of notations on the same form.

Q. Then the next is a similar form signed by Laura Jane Foote. The return is as follows:

“5/16/39, Central Bank. No account. Bank of America, no account. Central bank, no account. Farmers & Merchants, no account. Anglo-California, no account. American Trust Company, no account.”

That is dated May 18, 1939.

The next form is similarly signed by Mrs. Foote. The return is as follows:

“Bank of America, September 27, 1940. No funds. Bank of America—Fulton, September 30, 1940, no funds. Security First National, September 30, 1940, no funds.”

The next form is also signed by Laura Jane Foote.

“Returns: Bank of America, Fulton, August 13, 1941, no funds. Security First National, August 22, 1941, no funds. Bank of America, main, August 28, 1941, no funds.”

The next form is a similar form and also signed by Mrs. Foote:

“Returns: Bank of America, August 4, 1942, no funds. Security First National Bank, August 4, 1942, no funds. Bank of America, Fulton, August 15, 1942, no funds.”

The next form has obviously the same purpose but it is somewhat different in form. This is addressed to the Bank of America, Branch No. 46457, Oakland, California, and it is dated the 25th of July, 1942.

“Gentlemen:

‘We are enclosing herewith authorization for examination and report on any accounts the following may have, or may have had with you.

“Foote, Laura, Jane.”

And then the reply on the same form:

“We have reviewed our records but they do not indicate that the above party has any accounts at this office. Bank of America, N. T. & S. A., Oakland Main Office, J. P. Fiorani, Assistant Cashier.”

The file also includes the following document:

Statement of responsible relative of applicant under the Old Age Security Act of 1935.

“In order that the request of the below-named applicant may be considered, it is necessary that a statement of the financial condition of legally responsible relatives, including children and spouse of the applicant, be furnished the State by the County. The preparation of this form by responsible relatives will greatly facilitate completion of the investigation which must be carried out through credit associations and others if the relative does not choose to prepare a statement. This form may be returned in care of the applicant or mailed directly to Fresno County, Department of Public Welfare, 2107 Inyo Street, Fresno, California.

“Statement of responsible relative.

“I, Mrs. Betty Olender, 351 Fairmount, Oakland, California, of Oakland, County of Alameda, State of California, the daughter of Mrs. Laura Foote, an applicant for aged aid, do make the following answers to the questions below relative to my ability to aid such applicant.”

Then there are some immaterial questions which have been answered and the following heading:

“Assets: Do you or your spouse own your own home? No. What is the value of other real estate in which you have an interest?”

That is blank.

“Have you any cash on hand? No.

“Have you deposits in the bank: No.

“Have you deposits with building and loan associations:
No.

“Have you postal savings: No.

“Do you keep funds in the safe deposit box: No.

“Do you own negotiable securities? No.

“Do you own other stocks, bonds, mortgages or securities? No.

“Do you own personal property?”

Then the amount is shown \$100.

“Have you a part interest in property?”

That is blank. Or there is a little dash in it.

“Do you have an automobile? Yes. Make and model:
1933 Buick. Value: \$100.”

Then there is a section of “Obligations.” None are shown.

“Monthly income: What is your salary? Zero.

“What income do you receive from building and loan associations, stocks and bonds, rentals, other income:”

And in each case is zero, zero, zero, zero.

“Does your property produce farm or garden produce for household use? Zero. What are your spouse’s earnings? \$150.”

And then there is a section for monthly expenses, and the following:

“County of Alameda, State of California, SS. Betty B. Olender, being first duly sworn, states upon oath that the answers to the foregoing are her own statements; that they are of her own knowledge true in every particular; that they are the whole truth and that she has not prac-

ticed evasion nor withheld information as to her ability to aid her parent or spouse.”

And that is signed Betty B. Olender.

“Subscribed and sworn to this 23rd day of May, 1939, before me, a Notary Public of the County and State above written, Joseph Croter, Notary Public in and for the County of Alameda, State of California.”

Will you turn to that particular affidavit, Mr. Jensen?

A. Can I have the date on that again, please?

Q. Yes. I will see if there is a date. May 26th, 1939.

A. I have that.

Q. You will note, Mr. Jensen, that two lines are drawn through the name “Betty B. Olender,” apparently with pen, and the initials J. C. N. P. appear just above the signature of Betty B. Olender. Do you see that?

A. Yes, sir.

Q. Do you know why those lines are drawn through the name?

A. No, I do not.

Q. Will you state, Mr. Jensen, according to your records, when Laura Jane Foote first received old age assistance?

A. She first received old age assistance in Fresno County in June of 1938. But that was on a transfer from Alameda County. The law in California provides that as an old age pensioner moves from one county to another the county where they originally reside will pay aid for a full year until they gain residence in the second county. I do not know the exact date she started to receive aid in Alameda County, but there is an application—her original application was signed in October of 1936.

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes. I have no further questions.

UNITED STATES EXHIBIT NO. 24.

MILTON H. OLENDER

COMPARATIVE NET WORTH STATEMENT

As at December 31, 1947 and December 31, 1941

<u>ASSETS</u>	<u>Dec. 31, 1947</u>	<u>Dec. 31, 1941</u>
On Hand and in Banks—Exhibit "2".....	\$ 19,443.80	\$ 82,027.30
Stocks and Bonds—Exhibit "3"	88,151.15	xx
Real Estate Holdings—Exhibit "4"	80,886.09	33,000.00
Investment—Exhibit "5"	46,038.01	23,876.61
Life Insurance—Exhibit "6"	10,300.00	xx
Unpaid Life Insurance Premium Policy.....	15,833.46	xx
	<hr/>	<hr/>
TOTAL ASSETS.....	\$260,652.51	\$138,903.91
Liabilities—Personal Loans by Mrs. J. Olender—Mother	15,500.00	xx
	<hr/>	<hr/>
Net Worth—Exhibit "7"	<u>\$245,152.51</u>	<u>\$138,903.91</u>

Personal check issued to Bank of America dated June 5, 1945, for \$15,833.46. Check Number 2396 for \$15,000.00 transferred from the business bank account to the personal bank account of Milton Olender and deposited in his account for this transaction on June 1, 1945.

Originally, loan of \$10,500.00 to business. On Jan. 1, 1946 store check 2854 was issued to her in payment of this loan. She then endorsed this check back to Milton Olender as a personal loan and he used the proceeds in the purchase of 500 Bank of America Stock. See Exhibit "3"—Note "6"..... \$ 10,500.00

Repaid by Mrs. J. Olender on October 31, 1942 as payment on purchase of home at 351 Fairmont. Deposited in personal bank account Nov. 2, 1942.... 5,000.00

TOTAL..... \$ 15,500.00

Milton H. Olender, swear that this statement (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete statement, made in good faith as of the date stated.

Milton Olender

Errol E. Cropsey
Witness

Internal Revenue Agent

Subscribed and sworn to before me this 13th day of September, 1948.

Seth L. Root, Internal Revenue Agent

Q. Is that in your files?

A. It is. A copy of that is in my files. Alameda County, when they transferred the case to Fresno County, sent a copy of the original application.

Q. Mr. Jensen, does your file reflect when Mrs. Foote ceased receiving old age assistance?

A. Yes. The file—and I will quote here—old age security was discontinued as relatives assumed all responsibility as of February 28th, 1943.

Mr. Drewes. I have no further questions.

UNITED STATES EXHIBIT NO. 24.

MILTON H. OLENDER

COMPARATIVE NET WORTH STATEMENT

As at December 31, 1947 and December 31, 1941

<u>ASSETS</u>	<u>Dec. 31, 1947</u>	<u>Dec. 31, 1941</u>
Cash on Hand and in Banks—Exhibit "2".....	\$ 19,443.80	\$ 82,027.50
Stocks and Bonds—Exhibit "3"	88,151.15	x
Real Estate Holdings—Exhibit "4"	80,886.09	33,000.00
Store Investment—Exhibit "5"	46,038.01	23,876.60
Loans—Exhibit "6"	10,300.00	x
*Single Premium Life Insurance Policy.....	15,833.46	x
TOTAL ASSETS.....	\$260,652.51	\$138,903.90
**Less—Personal Loans by Mrs. J. Olender—Mother	15,500.00	x
Net Worth—Exhibit "7"	\$245,152.51	\$138,903.90

*Personal check issued to Bank of America dated June 5, 1945, for \$15,833.46. Check Number 2396 for \$15,000.00 transferred from the business bank account to the personal bank account of Milton Olender and deposited in his account for this transaction on June 1, 1945.

**Originally, loan of \$10,500.00 to business. On Jan. 17, 1946 store check 2854 was issued to her in payment of this loan. She then endorsed this check back to Milton Olender as a personal loan and he used the proceeds in the purchase of 500 Bank of America Stock. See Exhibit "3"—Note "6"..... \$ 10,500.00

Loaned by Mrs. J. Olender on October 31, 1942 as part payment on purchase of home at 351 Fairmont. Deposited in personal bank account Nov. 2, 1942.... 5,000.00

TOTAL..... \$ 15,500.00

I, Milton H. Olender, swear that this statement (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete statement, made in good faith as of the date stated.

Milton Olender
 Errol E. Cropsey
 Witness
 Internal Revenue Agent

Subscribed and sworn to before me this 13th day of September, 1948.
 Seth L. Root, Internal Revenue Agent

UNITED STATES EXHIBIT NO. 25.

MILTON H. OLENDER

CASH ON HAND AND IN BANKS

As at December 31, 1947 and December 31, 1941

	Dec. 31, 1947	Dec. 31, 1941
(1) Cash in Vault		\$ 75,000.00
(2) Bank of America—Oakland—Commercial.....	\$ 443.80	1,527.30
(3) Bank of America—Fresno—Savings A/C #129	3,000.00	3,000.00
(4) Trustee Accounts—Bank of America—Oakland for 3 children—#26518, #40020, and #40466—\$5,000 each	15,000.00	xx
(5) Cash—Store Registers and Personal.....	1,000.00	2,500.00
Total	<u>\$ 19,443.80</u>	<u>\$ 82,027.30</u>

(1) See Affidavit as to creation of this fund. During the years 1941-1945, inclusive, there was a constant switching of funds between this Cash in Vault, Personal Bank Account, and Store Investment, so that it would be impossible to tell just how these funds were used. The following sums were expended from cash:

January 10, 1944—3 Cashier's Checks to Goodman @ \$2,250.00	\$ 6,750.00
January 22, 1944—3 Cashier's Checks to Goodman @ \$2,250.00	6,750.00
January 22, 1944—3 Cashier's Checks @ \$2,350.00 to Goodman	7,050.00
U. S. Government Bonds—December, 1944	8,000.00
U. S. Government Bonds—November, 1945	5,000.00
Creation of 3 Trustee Accounts for chil- dren—November 20, 1945	15,000.00

(4) See (1) above

(5) Deposited \$1,500.00 in personal bank account
in 1945

MILTON H. OLENDER
STOCKS AND BONDS

As at December 31, 1947 and December 31, 1941

	12/31/47	12/31/41
(1) U. S. Treasury—2¼%—1959-62	\$ 33,000.00	\$
<i>Less</i> —Held for Mother—Purchased with her money	20,000.00	
Balance—Milton H. Olender	13,000.00	
(2) U. S. Treasury—2%—1951-53	10,000.00	
(3) U. S. Treasury—2¼%—1956-59	1,000.00	
(4) U. S. Treasury—2%—1952-54	13,000.00	
(5) U. S.—Series "E"—Face \$1,025.00.....	768.75	
(6) 750 Bank of America—N.T. & S.A.—Common	37,437.50	
(7) 100 Kingston Products	850.00	
(8) 100 Blair and Co., Inc.	812.50	
(9) 50 Blair and Co., Inc.	374.75	
(10) 100 Compania Azucarera Vicana	337.50	
(11) 50 Victor Equipment	570.15	
(12) 500 Asturias Export Corp.	5,000.00	
(13) Contra Costa Associates	5,000.00	
Total.....	<u>\$ 88,151.15</u>	<u>None</u>
(1) Store Check 2712—11/9/45		\$ 25,000.00
Cash from Mother for her bonds.....		20,000.00
Cash—Nov. 1945		5,000.00
Store Check 2332—4/28/45		5,000.00
Store Check 2625—9/30/45		3,000.00
Total.....		<u>\$ 58,000.00</u>
<i>Less</i> —Sold 8/22/46 and proceeds used on pur- chase of home @121 Alpine Terrace.....		25,000.00
Cost of Bonds on Hand—12/31/47		<u>\$ 33,000.00</u>
(2) Personal Check—9/12/43		5,000.00
Personal Check—10/1/43		5,000.00
Total Cost—12/31/47		<u>\$ 10,000.00</u>
(3) Personal Check—5/10/45 to J. C. Penny Co...		<u>\$ 1,000.00</u>
(4) Store Check 1991—12/16/44.....		\$ 5,000.00
Cash		8,000.00
Total Cost—12/31/47		<u>\$13,000.00</u>
(5) Various purchases of Series "E" bonds		

MILTON H. OLENDER

STOCKS AND BONDS

As at December 31, 1947 and December 31, 1941

(6) Store Check 2867—1/24/46		\$ 7,500.00
Store Check 2854—1/17/46 to Mrs. J. Olender —endorsed back to Milton Olender. In pay- ment of loan on business and then loaned back to Milton Olender as a personal loan...		10,500.00
Personal check—1/24/46		5,562.50
		<hr/>
Total Cost of 500 Shares		23,562.50
Store Check 3151—6/12/46	\$ 6,000.00	
Personal Check—6/13/46	7,875.00	
		<hr/>
Total Cost of 250 Shares		13, 875.00
		<hr/>
Cost of 750 Shares—On Hand 12/31/47		\$ 37,437.50
		<hr/> <hr/>
(7) Personal Check to Frank C. Knowlton— 4/17/46		\$ 850.00
		<hr/> <hr/>
(8) Personal Check to Frank C. Knowlton— 11/26/45		\$ 812.50
		<hr/> <hr/>
(9) Purchase by Alkus as part payment on \$850 advanced by Olender on 4/17/46 for pur- chase of stock for him		\$ 374.75
		<hr/> <hr/>
(10) Olender—Alkus Check 10/26/45		\$ 675.00
1/2 for Alkus		337.50
		<hr/> <hr/>
Cost of 100 Compania Azucarera Vicana		\$ 337.50
		<hr/> <hr/>
(11) Purchase by Alkus as part payment on \$850 advanced by Olender on 4/17/46—Differ- ence paid to Alkus in Cash		\$ 570.15
		<hr/> <hr/>
(12) Personal Check to Asturias Import and Ex- port Co. 12/12/46		\$ 5,000.00
		<hr/> <hr/>
(13) Personal Check to Harry Kagan—7/6/46		\$ 5,000.00
		<hr/> <hr/>

MILTON H. OLENDER
REAL ESTATE HOLDINGS

As at December 31, 1947 and December 31, 1941

	12/31/47	12/31/41
(1) Wilson Home—Fresno Rental Property.....	\$ xx	\$ 8,750.00
(2) Riverdale Ranch	xx	3,000.00
(3) 1/4 Interest in Fresno Olender Building.....	10,493.74	13,750.00
(4) Home—121 Alpine Terrace	45,638.20	xx
(5) Furniture—Personal	24,754.15	7,500.00
Totals.....	\$ 80,886.09	\$ 33,000.00
(1) Sold 5/29/46—See Tax Return for 1946		
(2) Sold 4/2/46 for \$3,000. Proceeds in Store Investment		
(3) Value 12/31/41 of 1/4 Interest	\$ 13,750.00	
Less—Depreciation Claimed	3,256.26	
Year 1942	\$ 431.26	
Year 1943	575.00	
Year 1944	575.00	
Year 1945	575.00	
Year 1946	550.00	
Year 1947	550.00	
Depreciated Value—12/31/47	\$ 10,493.74	
(4) Sold U. S. Bonds and used proceeds for purchase of home—8/22/46		
Personal check to E. H. Dimity—8/9/46.....	\$ 25,000.00	
Store Check 3259—8/27/46	1,000.00	
	19,638.20	
Total Cost of Home	\$ 45,638.20	

- (5) The Wilson home at Fresno had \$2,500 worth of furniture in it and was rented furnished. When the home was rented unfurnished in about 1942 or 1943 this furniture was moved to the Olender Building at Fresno and sold piece by piece at a loss. No loss was claimed on the tax return on the sale of this furniture. Taxpayer also had \$5,000 worth of personal furniture which was moved to the home at 351 Fairmont when it was purchased in 1942. This house was sold 2/7/47 as per the 1947 Return. Part of this furniture was sold with the house and the balance was sold at auction at Ford's Auction House, Oakland, in 1947. No loss was claimed on this furniture. Total estimated loss on these furnishings at both houses was about \$3,000.00.

Personal check No. 126 dated 2/11/47 for \$24,754.15 for purchase of furnishings for home at 121 Alpine Terrace.

MILTON H. OLENDER
STORE INVESTMENT

As at December 31, 1947 and December 31, 1941

<u>Account</u>	<u>Dec. 31, 1947</u>	<u>Dec. 31, 1941</u>
Cash in Bank	\$ 6,977.59	\$ 381.00
Merchandise Inventory	46,493.46	29,943.90
Furniture and Fixtures	xx	1,011.35
	<hr/>	<hr/>
Total Assets	\$ 53,471.05	\$ 31,336.25
Less—Accounts Payable	7,433.04	7,459.64
	<hr/>	<hr/>
Store Net Worth	\$ 46,038.01	\$ 23,876.61
	<hr/> <hr/>	<hr/> <hr/>

MILTON H. OLENDER
LOANS RECEIVABLE

December 31, 1947

	<u>Detail</u>	<u>Amount</u>
Contra Costa Associates:		\$2,800.00
Personal Check—December 5, 1946	\$1,000.00	
Personal Check—October 23, 1947	1,800.00	
	<hr/>	
Milton Schiffman:		7,500.00
Olender-Alkus check—May 14, 1947	2,000.00	
Personal Check—August 22, 1947	2,000.00	
Personal Check—October 28, 1947	1,000.00	
Personal Check—November 24, 1947	2,500.00	
	<hr/>	
Total Loans		<u>\$10,300.00</u>

MILTON H. OLENDER
ANALYSIS OF INCREASE IN NET WORTH

January 1, 1942 to December 31, 1947

<u>Descriptive</u>	<u>Detail</u>	<u>Amount</u>
Net Worth—December 31, 1947—Exhibit "1".....	\$	\$245,152.51
Less—Net Worth—December 31, 1941—Exhibit "1"		138,903.91
Net Increase in Net Worth		<u>\$106,248.60</u>

ACCOUNTED FOR AS FOLLOWS

Net Taxable Income Reported on Returns (100% on Capital Gains)	\$	\$170,888.11
Year 1942—per Returns	24,635.14	
Year 1943—per Returns	28,124.37	
Year 1944—per Returns	37,059.70	
Year 1945 (per Returns \$41,067.61 + Capital Gains \$132.75)	41,200.36	
Year 1946 (per Returns)	23,514.62	
Year 1947 (per Returns \$14,063.92 + Capital Gains \$2,290.00)	16,353.92	
Less—Estimated Unclaimed Losses on Sales of Furnishings		3,000.00
Net Income Accounted For		167,888.11
Less—Federal Income Taxes Paid—Husband and Wife—Net:		49,981.32
During Year 1942	174.08	
During Year 1943	8,829.83	
During Year 1944	7,862.32	
During Year 1945	16,341.94	
During Year 1946	17,326.59	
During Year 1947	5,508.76	
Total.....	56,043.52	
Less—Refunds of 1946 Income Tax in 1947	6,062.20	
Net Income—After Federal Income Taxes—January 1, 1942 to December 31, 1947		117,906.79
Add—Gifts from Mother—Exhibit "1"— Schedule "A"		10,500.00
Net Increase Accounted For		128,406.79
Less—Estimated Living Expenses (above deductible personal expenses)		22,500.00
Year 1942	3,000.00	
Year 1943	3,000.00	
Year 1944	3,000.00	
Year 1945	3,500.00	
Year 1946	4,000.00	
Year 1947	6,000.00	
Excess in Increase Accounted for Over Federal In- come Taxes and Estimated Living Expenses—Jan. 1, 1942 to Dec. 31, 1947		\$105,906.79

MILTON H. OLENDER

GIFTS FROM MRS. J. OLENDER—MOTHER

(Per Books of Mrs. J. Olender—Information from M. H. Olender)

WITHDRAWALS FROM SAVINGS ACCOUNTS IN FRESNO

<u>Date</u>	<u>Amount</u>
February 3, 1942	\$ 1,000.00 out
March 31, 1943	1,000.00 out
January 6, 1944	2,000.00 out
July 5, 1944	2,500.00 out ?
December 15, 1944	1,000.00 out
January 2, 1945	3,000.00 out
Total	<u><u>\$10,500.00</u></u>

DEFENDANT'S EXHIBIT AK.

MILTON H. OLENDER

NET WORTH

ASSETS:	<u>Dec. 31, 1944</u>	<u>Dec. 31, 1945</u>	<u>Dec. 31, 1946</u>
Cash in store registers	\$ 2,500.00	\$ 1,000.00	\$ 1,000.00
Net investment, Army and Navy Store	77,832.48	89,800.50	57,414.65
Nonbusiness bank accounts	3,822.89	31,485.58	36,783.05
Corporation stock (excluding As- turias)	552.95	1,150.00	43,382.40
Asturias stock or advances			10,000.00
U. S. Savings Bonds, Series "E"	693.75	768.75	768.75
Real Estate, net of depreciation...	31,600.00	30,875.00	68,511.31
Household furniture	5,000.00	5,000.00	29,701.67
Loan receivable, Contra Costa As- sociates			1,000.00
U. S. Treasury Bonds	24,000.00	82,000.00	57,000.00
Paid-up Life Insurance		15,833.46	15,833.46
Cash in safe deposit box	50,000.00	7,200.00	
Total Assets	<u>\$196,002.07</u>	<u>\$265,113.29</u>	<u>\$323,395.29</u>
LIABILITIES:			
Loan payable, Mrs. J. Olender....	\$ 5,000.00	\$ 5,000.00	\$ 15,500.00
Account payable, W. and J. Sloane			24,701.67
Total Liabilities	<u>\$ 5,000.00</u>	<u>\$ 5,000.00</u>	<u>\$ 40,201.67</u>
NET WORTH per Government Com- putation	<u>\$191,002.07</u>	<u>\$260,113.29</u>	<u>\$283,193.62</u>

ADJUSTMENTS

ADDITIONS

	<u>Dec. 31, 1944</u>	<u>Dec. 31, 1945</u>	<u>Dec. 31, 1946</u>
Cash in Safe Deposit Box No. 56, Bank of America, Main Office, Oakland:			
Balance per Schedule 4	\$ 72,039.97	\$ 30,825.43	\$ 385.02
Balance per Government Net Worth	50,000.00	7,200.00	
Increase in Cash in Safe De- posit Box	\$ 22,039.97	\$ 23,625.43	\$ 385.02
Army-Navy Store check No. 2200, drawn December 23, 1944 and de- posited in personal bank account January 10, 1945	1,000.00		
Amount paid for Goodman sailor suits, awaiting disposition of wrong sizes received, not taken into account in store inventory on books, per Schedule 1	20,550.00		
Overstatement of accounts payable Proceeds of Saraga check dated No- vember 15, 1945 in possession of Leavy, per Schedules 1 and 2..	6,903.02	7,725.00	
Total Additions	\$ 50,492.99	\$ 31,350.43	\$ 385.02
REDUCTION			
U. S. Treasury Bonds of mother, Mollie Olender, included in Gov- ernment computation		(20,000.00)	(20,000.00)
Net Additions and (Reduc- tion) to Net Worth	\$ 50,492.99	\$ 11,350.43	\$(19,614.98)
NET WORTH	<u>\$241,495.06</u>	<u>\$271,463.72</u>	<u>\$263,578.64</u>

MILTON H. OLENDER
NET INCOME

	1945	1946
Net Worth at December 31st	\$271,463.72	\$263,578.64
Net Worth at January 1st	241,495.06	271,463.72
	\$ 29,968.66	\$ (7,885.08)
Add:		
Non-deductible expenditures—		
Per stipulation	19,081.32	23,985.63
Not covered by stipulation—		
I. Magnin & Co.		863.72
Gray Shop		1,391.01
	\$ 49,049.98	\$ 18,355.29
Deduct:		
Non-taxable portion of net gain from sales of assets (stipulated)	139.77	464.47
Non-taxable gifts received:		
January 2, 1945 Mollie Olender, Mother	\$3,000.00	
August 24, 1945 Mrs. Widrin	575.00	
1945 Mrs. Foote	2,500.00	
	6,075.00	
Net Taxable Income	\$ 42,835.21	\$ 17,890.82
Net Taxable Income per Returns:		
	Husband	Wife
1945	\$ 21,096.38	\$ 19,971.23
1946	12,514.81	10,999.81
		41,067.61
UNDERSTATEMENT OF INCOME	\$ 1,767.60	
OVERSTATEMENT OF INCOME		\$ 5,623.80

MILTON H. OLENDER
DISPOSITION OF CASH IN SAFE DEPOSIT BOX

<u>1944</u>		<u>Additions</u>	<u>Withdrawals</u>	<u>Balance</u>
May 5	Cash in Safe Deposit Box per count by Milton Olender and Monroe Friedman..			\$75,000.00
" 5	Cash brought back from Texas trip.....	\$7,500.00		
June 16	Transfer to personal bank account.....		\$ 100.00	
" 22	Transfer to personal bank account.....		400.00	
" 27	Transfer to personal bank account.....		1,500.00	
July 5	Gift from mother, Mollie Olender, per U.S. Exhibit 24 (Ex. "7", Sched. "A")...	2,500.00		
" 17	Transfer to Olender-Elkus bank account..		1,500.00	
Aug. 24	Transfer to personal bank account.....		300.00	
Dec. 15	Gift from mother, Mollie Olender, per U.S. Exhibit 24, (Ex. "7", Sched. "A")....	1,000.00		
" 16	Purchase of U.S. Treasury Bonds, 2%, 1952-54 per U.S. Exhibit 24 (Ex. "3", Pg. 1, Item 4)		8,000.00	
Nov. & Dec.	Purchase of merchandise for store by cash—Barney		2,160.03	
" 31	Balance of Cash			72,039.97
 <u>1945</u>				
Jan. 2	Gift from mother, Mollie Olender, per U.S. Exhibit 24, (Ex. "7", Sched. "A")....	3,000.00		
"	Cash received from Fresno partnership...	1,807.46		
May 31	Purchased cashier's checks, Bank of America, 90-1: #25196778 to Milton Olender (Deposited Army-Navy Store June 20, 1945)		3,000.00	
	#25196779 to Milton Olender (Purchased Treasury Bonds, 2¼%, 1959-62, Bank of America, College Ave. Branch, June 6, 1945.....		3,500.00	
	#25196780, same as above		3,500.00	
	#25196781 To Milton Olender (Deposited Army-Navy Store June 20, 1945)		5,000.00	
June 9	Transfer to personal bank account		500.00	
Aug. 27	Transfer to personal bank account		522.00	
Nov.	Purchase of U. S. Treasury Bonds, 2¼%, 1959-62		5,000.00	
Nov.	Transfer to savings accounts: Milton H. Olender, Tr. for James Harold Olender		5,000.00	
	Milton H. Olender, Tr. for Richard Raymond Busby		5,000.00	
	Milton H. Olender, Tr. for Audry Elaine Olender		5,000.00	
Nov. 20	Transfer to personal bank account.....		10,000.00	
Dec. 31	Balance of cash			30,825.43
 <u>1946</u>				
Jan.	Cash received from Fresno partnership...	1,725.11		
Jan. 1	Transfer to personal bank account.....		6,000.00	
" 1	Transfer to Olender-McGrete bank account		5,000.00	
" 2	Transfer to Olender-Elkus bank account..		1,700.00	
July 10	Transfer to personal bank account.....		570.38	
Sept. 18	Transfer to Olender-Elkus bank account..		2,500.00	
" 23	Transfer to personal bank account.....		1,500.00	
"	Down payment on furniture, W. and J. Sloane		1,000.00	
Nov. 25	Transfer to personal bank account		6,000.00	
Dec. 4	Transfer to personal bank account.....		2,800.00	
" 20	Transfer to personal bank account.....		1,500.00	
	Non-deductible expenditures included in stipulation		1,340.40	
	Non-deductible expenditures admitted in evidence: I. Magnin & Co. \$ 863.73		2,254.74	
	Gray Shop	1,391.01		
Dec. 31	Balance of Cash.....			385.02

Net Worth
Net Worth

Increase

Add:

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1945 .

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UNDERS

OVERST

Amended Schedule 3-

No. 33181

Deft. Exhibit No. AK-1

Filed Oct. 2, 1952

C. W. Calbreath, Clerk

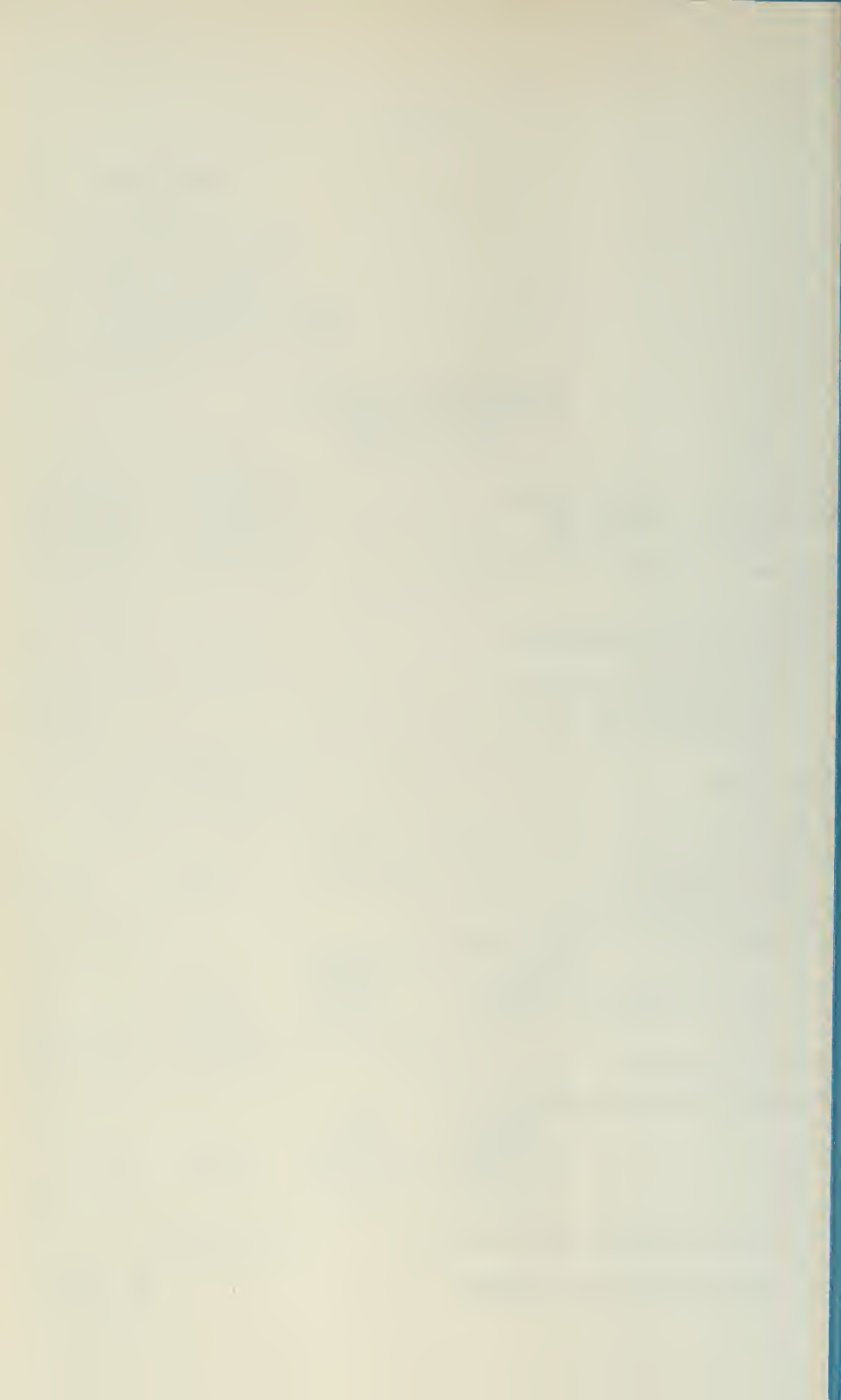
By Howard F. Magee

Deputy Clerk

MILTON H. OLENDER

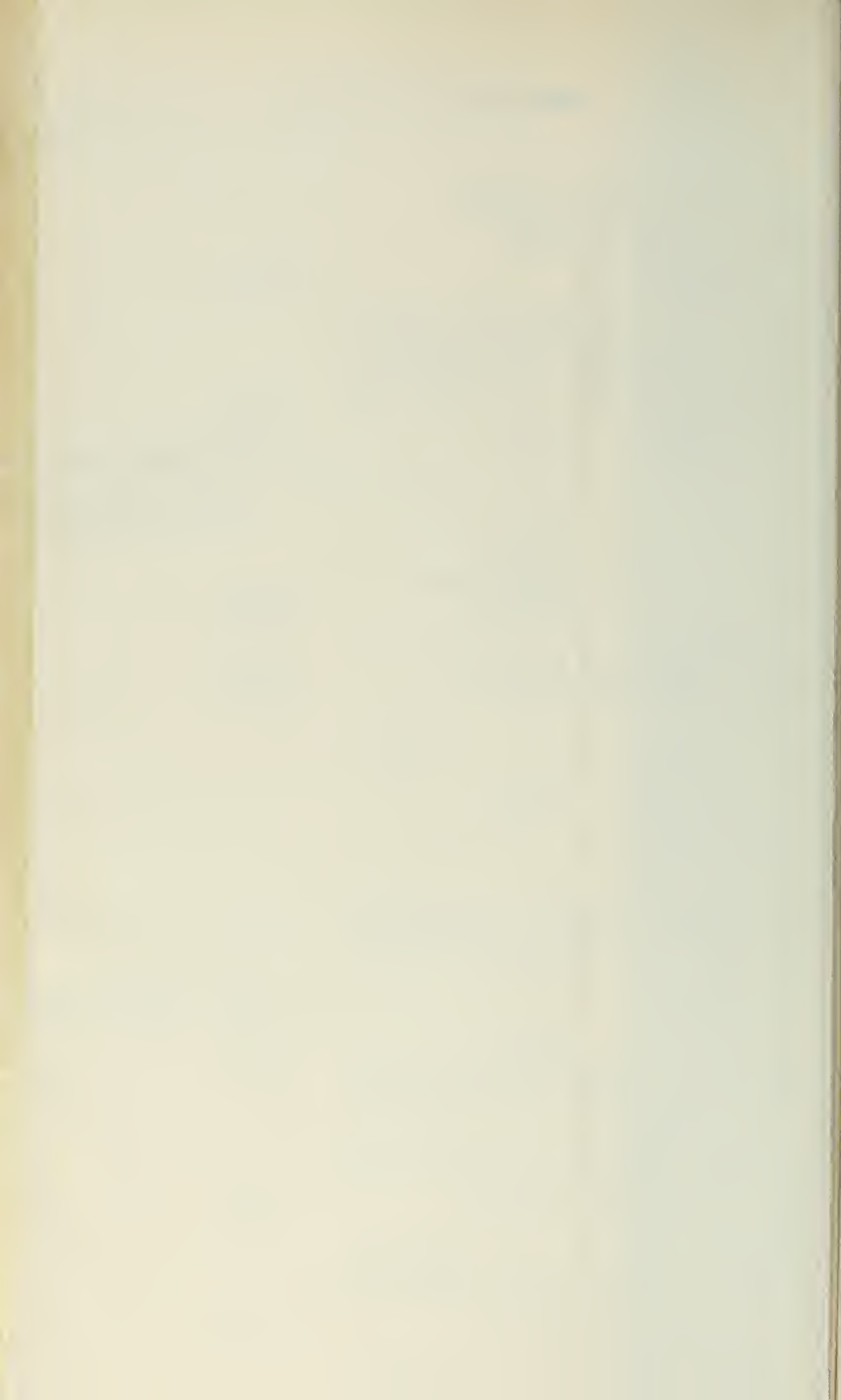
NET INCOME

	<u>1945</u>	<u>1946</u>
Net Worth at December 31st	\$271,463.72	\$265,833.38
Net Worth at January 1st	241,495.06	271,463.72
Increase or (decrease) in Net Worth	\$ 29,968.66	\$ (5,630.34)
Add:		
Non-deductible expenditures—		
Per stipulation	19,081.32	23,985.63
Not covered by stipulation—		
I. Magnin & Co.		863.73
Gray Shop		1,391.01
Total Income	<u>\$ 49,049.98</u>	<u>\$ 20,610.03</u>
Deduct:		
Non-taxable portion of net gain from sales of assets (stipulated)	139.77	464.47
Non-taxable gifts received:		
January 2, 1945 Mollie Olender, Mother	\$ 3,000.00	
August 24, 1945 Mrs. Widrin ..	575.00	
1945 Mrs. Foote ..	2,500.00	
	<u>6,075.00</u>	
Net Taxable Income	<u>\$ 42,835.21</u>	<u>\$ 20,145.56</u>
Net Taxable Income per Returns:		
	<u>Husband</u>	<u>Wife</u>
1945	\$ 21,096.38	\$ 19,971.23
1946	12,514.81	10,999.81
		<u>41,067.61</u>
		23,514.62
UNDERSTATEMENT OF INCOME.....	<u>\$ 1,767.60</u>	
OVERSTATEMENT OF INCOME		<u>\$ 3,369.06</u>



DEFENDANT'S EXHIBIT AL.

SCHEDULE 1
ANALY OF GOODMAN TRANSACTIONMilton Olender — Business
ARMY & NAVY STOREMilton Olender—PersonalTransactions not on store booksCash taken from safe box \$20,550.Purchased cashiers checks—given to Leavy.
Leavy paid to Goodman for merchandise.
(322 sailor suits at \$25. each delivered, all
wrong sizes. Not taken into regular store
inventory.) \$20,550.\$5,000. Leavy sold 20 suits at cost for M. Olender to Lerman \$5,000.\$8,550. 342 suits unsold Leavy, transferred to store 8,550.280 suits sold by Leavy for M. Olender—
spring 1945 \$7,000.Proceeds turned over to Saraga by Leavy for
additional merchandise—August 1945 \$7,000.Refund sent to M. Olender—November 1945.
Saraga unable to furnish merchandise ordered \$7,000.725. Refunded to M. Ol. Included in check from Saraga \$ 725.Total of Saraga check dated Nov. 15, 1945.
Endorsed by M. Olender and given to Leavy
to purchase merchandise. (Check not deposited) \$7,725.Check or proceeds thereof given to Saraga by
Leavy for additional merchandise. (Check
outstanding as of Dec. 31, 1945) \$7,725.Saraga again unable to deliver merchandise.
Sent refund check to M. Olender. Deposited to
personal bank account April 5, 1946. Check
returned by bank as uncollectible. \$7,725.Saraga sent new certified check to M. Olender,
which was also deposited in his personal
account on June 28, 1946 \$7,725.Deposited in store bank account June 19, 1945. Additional
investment credited to M. Olender capital account on books.Not charged to purchases on store books. 20 suits sold
through store registers. 322 suits included in inventory
at Dec. 31, 1945. (Resulting in understatement of cost of
goods sold for 1945 and corresponding overstatement of
profit by \$8,550.)\$13,550. Cash from personal account invested in business\$18,000. July 23, 1945 M. Olender drew 5 checks of \$3,600. each to
Saraga.6,500. Aug. 2, 1945 M. Olender drew check of \$6,500. to Saraga.\$24,500. Total of Olender's store checks paid to Saraga (via Leavy)(23,775.) Merchandise shipped by Saraga to M. Olender, charged to
purchases on store books.\$ 725. Reimbursed business. (Cash debited and accounts payable
credited in amount of \$725. under date of Nov. 30, 1945)



SCHEDULE 2
ANALYSIS OF SARAGA TRANSACTIONS

(1)	Merchandise invoiced 7/31/1945 1000 suits at \$25.00	\$25,000.00
(2)	Merchandise not delivered 49 suits at \$25.00	1,225.00
(3)	Net merchandise shipped (Per M. Olender books PR 41— 7/31/45)	<u>\$23,775.00</u>
(4)	Total paid through store checks (Per M. Olender books, C.P. 53) 7/23/45 \$18,000.00 8/2/45 6,500.00	<u>\$24,500.00</u>
(5)	Merchandise shipped (Per M. Olender books, PR-41) 7/31/45	<u>23,775.00</u>
(6)	Refund due store (Per M. Olender books, G.J. 21) 11/30/45	725.00
(7)	Refund due Milton H. Olender, personal (Represents proceeds turned over by Leavy to Saraga August, 1945 per Saraga books, page 84)	<u>7,000.00</u>
	Amount of Saraga check dated 11/15/45 (Proceeds turned over to Leavy in 1945 for transmission to Saraga and refunded in 1946.)	<u>\$ 7,725.00</u>

UNITED STATES EXHIBIT NO. 15.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, —against— MILTON H. OLENDER,	} }	Plaintiff, Defendant. No. 33181
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STIPULATION

This stipulation is entered into by and between the parties to this proceeding (by their respective counsel). The parties are bound by this stipulation for the purposes of this proceeding only, and this stipulation does not preclude either party from offering evidence of any character bearing on or related to willfulness or lack of willfulness, or any evidence relating to items of assets, liabilities or expenditures of Milton H. Olender or Mrs. Betty Olender which are not included in this stipulation. Each party shall have the right to show the sources involved in items in this stipulation.

1. On the dates shown below Milton H. Olender and his wife, Mrs. Betty Olender, owned the following assets and owed the following liabilities (both at cost) :

SPECIFIED ASSETS AND LIABILITIES OF MILTON H. AND BETTY
OLENDER AT CLOSE OF YEARS 1944, 1945 and 1946

<u>ASSETS</u>	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
Army and Navy Store (not on books)			
Cash in store registers	\$ 2,500.00	\$ 1,000.00	\$ 1,000.00
Army and Navy Store (per books)			
Assets			
Cash in bank (net after outstanding checks)	\$ 19,881.55	\$ 28,412.31	\$ 2,598.38
Merchandise Inventory	85,011.26	83,394.64	57,449.58
Furniture and fixtures (net after dep.)	1,264.60	393.29	—0—
	<u>\$106,157.41</u>	<u>\$112,200.24</u>	<u>\$ 60,047.97</u>

<u>Assets (cont.)</u>	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
Liabilities			
Accounts payable	\$ 14,362.70	\$ 8,074.74	\$ 2,204.2
Notes payable	13,500.00	13,500.00	—0—
Fed. O.A.B. taxes.....	—0—	—0—	21.5
State U.E. taxes.....	462.23	825.00	21.5
Withholding taxes	—0—	—0—	386.0
	<u>\$ 28,324.93</u>	<u>\$ 22,399.74</u>	<u>\$ 2,633.3</u>
Net Investment	<u>\$ 77,832.48</u>	<u>\$ 89,800.50</u>	<u>\$ 57,414.6</u>
Cash in banks (other than commercial ac-			
count Army and Navy Store)			
Bank of America, Oakland Main Office			
Checking accounts			
Milton H. Olender (after recon-			
ciliation for outstanding checks) \$	277.22	\$ 8,253.03	\$ 5,477.1
Olender and Alkus (after recon-			
ciliation for outstanding checks)	434.58	90.28	2,911.7
Savings accounts			
Milton H. Olender, Trustee for			
James Harold Olender.....	—0—	5,000.00	5,050.1
Milton H. Olender, Trustee for			
Richard Raymond Busby	—0—	5,000.00	5,050.1
Milton H. Olender, Trustee for			
Audrey Elaine Olender	—0—	5,000.00	5,050.1
Mrs. Betty Olender	—0—	5,000.00	10,070.0
Bank of America, Fresno Main Office			
Savings account No. 129, Milton			
Olender	3,111.09	3,142.27	3,173.7
Totals	<u>\$ 3,822.89</u>	<u>\$ 31,485.58</u>	<u>\$ 36,783.0</u>
Ill corporation stock (except that of			
Asturias Import and Export Cor-			
poration) at cost			
Bank of America, Common	\$ —0—	\$ —0—	\$ 37,437.5
Kingston Products Co., Common	—0—	—0—	850.0
Blair & Co., Inc., Common.....	—0—	812.50	1,187.2
Compania Azucarera Vieana.....	—0—	337.50	337.5
Victor Equipment Company	—0—	—0—	570.1
Contra Costa Associates.....	—0—	—0—	5,000.0
Packard Motors Co., Common.....	552.95	—0—	—0—
Totals	<u>\$ 552.95</u>	<u>\$ 1,150.00</u>	<u>\$ 45,382.4</u>

<u>Assets (cont.)</u>	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
J. S. Savings Bonds Series E	\$ 693.75	\$ 768.75	\$ 768.75
Real estate and improvements (exclusive of Army-Navy Store).....	\$ 35,275.00	\$ 35,275.00	\$ 71,261.31
Less: accumulated depreciation per tax returns	3,675.00	4,400.00	2,750.00
Net real estate	<u>\$ 31,600.00</u>	<u>\$ 30,875.00</u>	<u>\$ 68,511.31</u>
Paid Up Life Insurance with New York Life Insurance Company	\$ —0—	\$ 15,833.46	\$ 15,833.46
Loans receivable			
Contra Costa Associates	—0—	—0—	1,000.00
Household furniture (except purchased from W. & J. Sloan).....	\$ 5,000.00	\$ 5,000.00	\$ 4,000.00
Household furniture, etc., (purchased from W. & J. Sloan)	—0—	—0—	25,701.67
<u>LIABILITIES</u>			
Loans payable—Mrs. J. Olender.....	\$ 5,000.00	\$ 5,000.00	\$ 15,500.00
Account payable—W. & J. Sloan.....	—0—	—0—	\$ 24,701.67

2. It is stipulated that Milton H. Olender and his wife, Mrs. Betty Olender, had in their possession at the close of the years involved United States Treasury bonds in the face amount set forth below. Each party shall have the right to offer evidence as to the ownership or source of the funds with which the bonds were purchased:

	<u>12-31-44</u>	<u>12-31-45</u>	<u>12-31-46</u>
J. S. Treasury 2% 1951-53.....	\$ 10,000.00	\$ 10,000.00	\$ 10,000.00
J. S. Treasury 2¼% 1959-62.....	—0—	58,000.00	33,000.00
J. S. Treasury 2¼% 1956-59.....	1,000.00	1,000.00	1,000.00
J. S. Treasury 2% 1952-54.....	13,000.00	13,000.00	13,000.00
	<u>\$ 24,000.00</u>	<u>\$ 82,000.00</u>	<u>\$ 57,000.00</u>

3. During the years 1945 and 1946 Milton H. Olender and Mrs. Betty Olender, his wife, made expenditures which were not deductible for Federal income tax purposes in the following amounts:

	<u>1945</u>	<u>1946</u>
	\$ 19,081.32	\$ 23,985.63

These figures include Federal income taxes paid, but exclude all items appearing in the preceding paragraphs of this stipulation and do not include the following items of alleged expenditure during the year 1946:

Personal checks	
June 7, 1946 to Electrolux Corporation	\$ 71.4
April 19, 1946 to George Belling.....	155.3
August 9, 1946 to Milt Young Motors.....	925.0
December 19, 1946 to Electrolux Corporation.....	71.8
Business checks (Army and Navy Store)	
January 31, 1946, No. 2879 to Mrs. Julius Olender.....	112.0
Cash payments	
I. Magnin Co. (year 1946).....	2,674.6
Gray Shop (year 1946).....	1,357.0
Lindburg's (year 1946)	416.3
Morris Brothers (October, 1946).....	676.6
 Total	 \$6,460.4

4. In the years 1945 and 1946, Milton H. and Mrs. Betty Olender had net long-term capital gains, the nontaxable portions of which were in the following amounts:

	<u>1945</u>	<u>1946</u>
	\$139.77	\$464.4

Respectfully submitted,

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